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146 U.S. 354

TRANSCRIPT OF RECORD.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE EIGHTH CIRCUIT.

OCTOBER TERM, A. D. 1891.

No. 67

THE CHICAGO AND NORTH-WESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

JOHN OSBORNE,

Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Iowa. Central Division.

FILED JANUARY 18, 1892.

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UNITED STAT[ES] [COURT] OF APPEALS

OCT[OBER TERM], 1891.

THE CHICAG[O, ROCK ISLAND & PACIFIC] [RAILWAY] [COMPANY],

Plaintiff in Error,

vs.

Defendant in Error.

Error to the Circuit Cour[t of the United States for the Northern] District of Iowa. Central

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NOTICE TO COUNSEL:

It is the intention to bind, in volumes, one copy each of the briefs and printed records of the Court, and for the purpose of securing uniformity in size, it is suggested that Counsel have their briefs printed on paper not less than 6¼ inches wide, by 9⅜ inches long, including margin.

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PLEAS AND PROCEEDINGS in the Circuit Court of the United
2½ States for the Southern District of Iowa, at DesMoines, at a term thereof begun and holden on the third Tuesday in Octo-
ber, it being the 20th day of October, A. D. 1891, before the Honorable OLIVER P. SHIRAS, one of the judges of said court.

3 UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable Judges of the United States Circuit Court for the Southern District of Iowa, Central Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court, before you at the October term, 1891, thereof, between John Osborn, plaintiff, and the Chicago and North-Western Railway Company, defendant, a manifest error hath happened to the great damage of the said Chicago and North-Western Railway Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the day of January, 1892, to the end that, the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of November, in the year of our Lord one thousand eight hundred and ninety-one.

Issued at office in DesMoines, Iowa, with the seal of said United States Circuit court, and dated as aforesaid.

[SEAL.] EDWARD R. MASON,
Clerk of said U. S. Cir. Court.

Allowed by
O. P. SHIRAS,
Judge.

4 In pursuance of the foregoing writ of error, I, Edward R. Mason, clerk of the United States Circuit Court for the Southern District of Iowa, do hereby certify and return full, true and complete transcript of the records, pleadings and proceedings concerning the same, in a certain cause in said court, wherein John Osborne is complainant and the Chicago and North-Western Railway Company is defendant.

I also attach and return herewith the original citation in said case.

In testimony whereof, I hereunto set my hand and affix the seal of said court at my office in the city of Des Moines, in said district, this 7th day of January, A. D. 1892.

EDWARD R. MASON,

[SEAL.] *Clerk of the United States Circuit Court for the Southern District of Iowa, Central Division.*

5 IN THE UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

John Osborne, *Plaintiff*,
vs.
The Chicago and North-Western Railway Company, *Defendant*. } *Law.*

To the Circuit Court of the United States, Southern District of Iowa, Central Division.

The plaintiff, John Osborne, claims of the defendant, the Chicago and North-Western Railway Company, upon the several causes of action in the several counts of this petition, as hereinafter set forth, the aggregate sum of $1,200, as money justly due him from the said defendant, with a reasonable attorney's fee, and for causes of action set forth the following, to-wit:

FIRST COUNT. The plaintiff avers that the defendant is a body corporate, doing business in the State of Iowa, at the points hereinafter named, as a common carrier of freight and passengers over certain lines of railroad, as owner and lessee thereof, extending from the city of Chicago, Illinois, to points on the Missouri river in the State of Iowa, and to points beyond the State of Iowa, in the State of Nebraska, in part as follows, to wit:

From Chicago, Illinois, to Council Bluffs and Sioux City, Iowa, by way of Carroll, Maple River, Dennison, Missouri Valley and intermediate points. Also from Chicago, Illinois, to Sioux City and Council Bluffs, Iowa, and other points on the Missouri river by way of Maple River, Wall Lake, Ida Grove and Onawa. The branches of defendant's road south are from Carroll to Manning, eighteen
6 miles; thence south-east to Audubon, eighteen miles, and south-west from Manning to Kirkham, seventeen miles. Defendant

also operates a branch road north-west on its road from Wall Lake to Moville, a distance of eighty miles.

The defendant has two lines of road from Chicago to Sioux City, and other points on the Missouri river, one over the Sioux City and Pacific branch, by way of Missouri Valley, the other by way of Onawa, Ida Grove and Maple River, and that defendant also operates its road in connection with other roads east from Chicago in the transportation of freight to New York, Philadelphia, Boston, Baltimore and other seaboard points.

Plaintiff avers that the respective distances from the city of Chicago, Illinois, to the points above named in Iowa and intermediate points on the road operated by defendant are as follows:

From Chicago, Illinois, to Carroll, Iowa.....395 miles.
" " " " Maple River, Iowa.....398 miles.
" " " " Dennison, Iowa.....423 miles.
" " " " Missouri Valley, Iowa....467 miles.
" " " " Council Bluffs, Iowa.....488 miles.
" " " " Scranton, Iowa.....379 miles.

That the defendant is and was at the times and dates of the happening and commission of the wrongs as hereafter set forth, a common carrier, engaged in the business of transporting freight and passengers over certain lines of railroad in the States of Iowa, Illinois and Nebraska, and in connection with other railroads from Chicago east to New York, Philadelphia, Boston, Baltimore and other seaboard points, as more particularly set forth in the first count of this petition.

7 Plaintiff avers that he is a citizen of the State of Iowa, and resides at Scranton in said state, and has been such resident and citizen, and has done business at Scranton, in the State of Iowa, as a grain buyer and shipper, prior to and ever since the 1st day of August, 1887.

Plaintiff avers that the said defendant, on the 30th day of December, 1887, issued its special tariff for the transportation of corn and oats destined for New York, Philadelphia and Baltimore, at eleven cents per hundred pounds, from Blair and other points in the State of Nebraska, to Turner Junction or Rochelle, Illinois, specifying that the said corn and oats would be carried at Chicago rates east from Rochelle and Turner Junction, Illinois, to wit: To New York for twenty-seven and one-half cents per hundred pounds; to Boston for thirty-two and one-half cents per hundred pounds; to Philadelphia for twenty-five and one-half cents per hundred pounds; to Baltimore for twenty-four and one-half cents per hundred pounds. And that in pursuance of said tariff the defendant did, on and after the 30th day of December, 1887, up to and including the 1st day of Febuary, A. D. 1888, carry and transport corn and oats from Blair and other points in Nebraska, over its said

road in Iowa to Turner Junction and Rochelle, Illinois, and through to the city of Chicago, Illinois, as hereinafter specified for the sum of eleven cents per hundred pounds.

Plaintiff avers that the corn and oats so nominally shipped and transported to Rochelle and Turner Junction, Illinois, was in fact shipped to Chicago, Illinois, and the rebilling and transfer of said grain for eastern points was done at Chicago, Illinois.

Plaintiff avers that during the dates above named and during the time defendant was so carrying and transporting grain over its road through Iowa from points in Nebraska, at the rates aforesaid, to 8&9 wit: eleven cents per hundred pounds to Chicago, Illinois, this plaintiff had for shipment at Scranton, on defendant's road in Iowa for eastern points, corn and oats described in Exhibit No. 1, hereto attached and made a part of this petition, and that the rate so given as aforesaid from points in Nebraska were not published at any of the stations on defendant's road in Iowa, nor were they published at Scranton, where plaintiff made shipment of grain, and said rate was refused at all points on defendant's road in Iowa notwithstanding the same was for a shorter distance and was other, wise for a like contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

Plaintiff avers that by reason of the premises he was compelled to ship said grain to Chicago upon defendant's road at the rate of eighteen cents per hundred pounds, and to pay said rate to defendant, and plaintiff did so ship the same in car lots, as set forth in exhibit No. 1 aforesaid, which exhibit contains the dates of shipment, number of car, number of pounds in each car.

Wherefore, plaintiff charges that the difference between the rate so paid, to wit: eighteen cents per hundred pounds, and the rate at which corn and oats were carried by defendant to Chicago from Blair and other points in Nebraska, to wit: eleven cents per hundred pounds, and which difference was seven cents per hundred pounds, was unreasonable, unjust and unlawful discrimination, the latter being for a greater distance and for a like and contemporaneous service in the transportation of a like traffic, under substantially similar circumstances, and that defendant then and there demanded and received from plaintiff said sum of eighteen cents per hundred pounds on 995,920 pounds of corn and oats, so shipped as aforesaid and demanded and received as aforesaid, in excess of a lawful and reasonable amount, the sum of $\$697\frac{14}{100}$ dollars, unreasonably, 10 unjustly and unlawfully, contrary to the provisions of the act, of Congress entitled: "An act to regulate commerce, approved February 4, 1887," wherefore plaintiff avers that he was damaged by the wrongful acts of defendant, as in this count of his petition above set forth, in the sum of $\$697\frac{14}{100}$ dollars, for which he

asks judgment on this count against defendant, with interest at six per cent. per annum from January 31, A. D. 1888.

SECOND COUNT. And for other, further and different cause of action, plaintiff claims of defendant the further sum of $300\frac{78}{100}$ dollars, as money justly due from said defendant, and for cause of such claim shows:

That the defendant is, and was at the times and dates of the happening and commission of the wrongs hereafter set forth, a common carrier, engaged in the business of transporting freight and passengers over certain lines of railroad in the States of Iowa, Illinois and Nebraska, and in connection with other railroads from Chicago east to New York, Philadelphia, Boston, Baltimore and other seaboard points, as more particularly set forth in the first count of this petition, and plaintiff was a citizen of the State of Iowa, and resided at Scranton in said state and was doing business then and there as a grain buyer and shipper, prior to and ever since the 1st day of August, 1887.

Plaintiff avers that the defendant, the Chicago and North-Western Railway Company, from the 17th day of February, A. D. 1887, to the 1st day of March, A. D. 1888, inclusive, had in force a joint through tariff, and carried corn and oats from Blair and other points in Nebraska over its said lines in Iowa to Chicago, Illinois, and thence over connecting lines to the city of New York,
11 at the rate of thirty-six and one-half cents per hundred pounds, in car-loads, and that during said dates the said defendant demanded from all shippers for transporting corn and oats from its said station of Scranton, on its road in Iowa, the local rate to Chicago, Illinois, to wit: eighteen cents per hundred added to the local rate from Chicago, Illinois, to New York, to wit: twenty-seven and one-half cents per hundred, and refused to ship any corn and oats from Scranton, on its said road in Iowa, and its eastern connections to New York for any less sum, and that plaintiff, between said dates, to wit: at the dates and times particularly specified in Exhibit 2 hereto attached and made a part of this petition, had for shipment at Scranton, in Iowa, to New York, corn and oats over defendant's road and connecting roads, the number of cars and the number of pounds specified in said Exhibit 2; and the said defendant, by its agents at the said station, to wit: at Scranton, in the State of Iowa, then and there unreasonably, unlawfully and unjustly refused to ship the same for plaintiff at said rate of thirty-six and one-half cents, but demanded the sum of forty-eight and one-half cents per hundred pounds upon the amount of corn and oats, as shown in said exhibit.

Plaintiff avers and shows that said shipments, so demanded as aforesaid, were for a less distance than the shipments from Blair and other points in Nebraska to the city of New York, so made by

defendant as aforesaid at the rate of thirty-six and one-half cents per hundred pounds, and was otherwise, for a like contemporaneous service in the transportation of a like traffic, under substantially similar circumstances, and that defendant demanded, then and there as aforesaid, from plaintiff, the sum of nine cents per hundred pounds in excess of the rate charged and received, as aforesaid, for shipments of grain from Blair and other points in Nebraska to the city of New York, and seven cents in excess of what it charged and received for transportation to Chicago.

12 Plaintiff avers that by reason of the unlawful and excessive demand so made by defendant, as aforesaid, plaintiff was compelled to ship, and did ship said grain as in schedule No. 2 particularly set forth, to the city of Chicago, Illinois, over defendant's road, and was compelled to pay, and did pay defendant the local rate to Chicago, Illinois, to wit: the sum of eighteen cents per hundred pounds on said shipments.

Plaintiff avers that the actual loss and damage to him by reason of the unlawful and unjust demand and discrimination aforesaid, was the difference between the through rate of 36½ cents to New York and the aggregate of the two local rates, as aforesaid, and the difference between the rate charged plaintiff for shipment to Chicago and charged and received by defendants for shipments from Nebraska.

Plaintiff avers that the number of pounds so held for shipment and shipped, as aforesaid, as shown by the schedule was 334,210 pounds, and the excess of charges so demanded and received, to wit: nine cents per hundred pounds, amounts to $300.78 dollars.

Wherefore plaintiff avers that he was damaged by the unlawful acts of defendant as in this count of his petition set forth in the sum of $300\frac{78}{100}$ dollars, for which he asks judgment on this count against defendant, with interest at six per cent. per annum from 24th of February, A. D. 1888.

Plaintiff avers that all of said demands are due and unpaid, and are still the property of plaintiff, and plaintiff asks judgment against defendant upon all of the several causes of action in the preceding counts of his petition in the aggregate sum of $1,200 dollars, and in addition thereto a reasonable attorney's fee for the prosecution of this suit, to wit: the sum of two hundred dollars, and for costs.

(Signed): C. C. & C. L. NOURSE.
Attorneys for Plaintiff.

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13 STATE OF IOWA, }
GREENE COUNTY: }

I, John Osborne, being duly sworn, say that I am plaintiff in the above entitled cause; that I have read the contents of the foregoing petition and the same is true as I verily believe.

(Signed): JOHN OSBORNE.

Subscribed in my presence and before me sworn to by John Osborne, at Scranton, Iowa, on the 24th day of January, A. D. 1890.

(Signed): PERRY P. PITCHER,
[SEAL.] *Notary Public, in and for Green County, Iowa.*

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14 EXHIBIT No. 1.

Date.	Car No.	Weight.
1887.		
Dec. 31.	11,250	31,550
1888.		
Jan. 2,	33,044	31,610
" "	17,224	43,730
" 5,	6,474	35,210
" "	2,760	32,640
" 9,	4,114	32,040
"	3,046	35,170
" 11,	40,206	41,650
" 12,	108	33,610
" "	18,462	44,210
" 13,	13,162	28,100
" "	17,384	37,650
" 17,	836	31,860
" "	4,704	40,340
" 18,	30,864	28,800
" 25,	3,694	32,050
" "	2,656	34,400
" 26,	6,890	29,900
" "	7,636	31,100
" "	6,147	34,000
" "	10,880	31,340
" 27,	20,046	31,080
" 30,	45,624	41,970
" "	33,254	30,770
" "	8,490	29,980
" "	1,428	51,240
" "	1,760	31,210
" 31,	8,916	28,740
" "	9,066	29,970
Total weight,		995,920
		7
Overcharge,		$697.14

EXHIBIT No. 2.

Date.	Car No.	Weight.
1888.		
Feb. 17.	31,114	21,920.
" 20,	15,762	33,250.
" "	1,012	30,370.
" 21,	32,510	28,470.
" 23,	4,876	41,000.
" "	4,474	44,500.
" "	6,538	30,860.
" "	11,683	36,840.
" "	18,550	38,400.
" 24	5,836	28,600.
Total weight,		334,210.
		9
Overcharge,		$300.28.

15 IN THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

John Osborne
vs.
Chicago & North-Western Railway Company. } *At Law.* *No. 3,428.*

The defendant, for answer to each count of plaintiff's petition, respectfully states:

On the 8th day of May, 1888, the plaintiff filed his petition against this defendant with the Interstate Commerce Commission of the United States, praying relief on account of the identical matters complained of in plaintiff's petition in this behalf; on the 4th day of June, 1888, the defendant filed its answer thereto; on the 26th day of July, 1888, the matters so complained of were heard by the Interstate Commerce Commission at Dubuque, Iowa; afterwards, March 22, 1889, the Interstate Commerce Commission decided and adjudicated all and singular the identical matters now complained of in plaintiff's petition herein, and that by virtue of the provisions of section 9 of an act of Congress, entitled "An Act to Regulate Commerce," passed April 4, 1887, the Interstate Commerce Commission had jurisdiction to hear and finally determine all matters complained of in plaintiff's petition before said commission and now pleaded in this suit.

Wherefore, defendant says that the plaintiff ought not to further have or maintain his action in this behalf on any of the counts set forth.

16 For further defense to the first count of plaintiff's petition, defendant says: It admits that it is a body corporate, operating railways in the State of Iowa, as alleged, with this qualification: The Fremont, Elkhorn and Missouri Valley Railroad Company is a corporation duly organized under and by virtue of the laws of the State of Nebraska, and, as such corporation, operates its own railroad; the Sioux City and Pacific Railroad Company is a corporation organized under the laws of the United States, and operates its own line of railroad. This defendant is not the lessee, nor does it operate either the Fremont, Elkhorn and Missouri Valley Railroad or the Sioux City and Pacific Railroad. This defendant owns a majority of the stock of the Fremont, Elkhorn and Missouri Valley Railroad Company and of the Sioux City and Pacific Railroad Company. Defendant admits the distances between points to be as stated in the first count of plaintiff's petition; admits that plaintiff is a citizen of Iowa and resides at Scranton, Iowa, on the main line of the defendant's line of road; admits that plaintiff shipped the grain at the times and for the prices stated in the first count.

Defendant admits that on the 30th day of December, 1887, 2d day of January, 1888, 14th day of January, 1888, and up to and including the 31st day of January, 1888, joint tariffs were made and went into effect between the Fremont, Elkhorn and Missouri Valley Railroad, Sioux City and Pacific Railroad and the Chicago and North-Western Railway and various lines running from Chicago to the sea-board, on corn and oats, in car loads, from Nebraska points to New York, Philadelphia, Baltimore and Boston, making the following rates through from Blair, Nebraska, which was the lowest rates in force from any point in that state:

December 30, 1887, to January 1, 1888 as follows:

Blair to	New York, rate	38½
"	Philadelphia	36½
"	Baltimore	35½
"	Boston	43½

January 2, 1888, to and including January 13, 1888:

17 Blair to	New York rate	41
"	Philadelphia	39
"	Baltimore	38
"	Boston	46

January 14, 1888, to and including January 31, 1888:

Blair to	New York	38½
"	Philadelphia	36½
"	Baltimore	35½
"	Boston	43½

All through tariffs from points in Nebraska to New York, Philadelphia, Baltimore and Boston were canceled February 1st to 16th, inclusive.

On February 17, 1888, a through tariff was issued from points in Nebraska to New York, Philadelphia, Baltimore and Boston. The lowest rates in this tariff were from Blair, Nebraska, and were as follows:

Blair to	New York	36½
"	Philadelphia	34½
"	Baltimore	33½
"	Boston	41½

Previous to February 17, 1888, through tariffs to the sea-board issued by the Fremont, Elkhorn and Missouri Valley Railroad and the Sioux City and Pacific Railroad and the Chicago and North-Western Railway and other roads east of Chicago, were not put in the hands of defendant's agents on the main line in Iowa, Clinton to Missouri Valley, or branches, and defendant denies that plaintiff or any shipper located at such stations has in any way been damaged by the failure of the defendant to do this, and defendant denies that

a higher rate has been charged on any shipment made over its
18 road from the above stations in Iowa to the sea-board points named above than those in force from Blair, Nebraska, during the same time.

All joint tariffs issued in connection with the Fremont, Elkhorn and Missouri Valley Railroad since February 17, 1888, have in each case been filed with all defendant's agents, Clinton to Missouri Valley, inclusive. The division of the through rates from points in Nebraska to New York, Philadelphia, Baltimore and Boston were changed from time to time, as per agreement, between all lines, parties to the through tariffs, and grain handled on some of the tariffs, in order to secure as favorable rate as possible east of Chicago, was billed to Rochelle, Illinois, and Turner Junction, Illinois, and re-billed from those points to the seaboard.

Defendant denies each and every allegation in the first count of plaintiff's petition inconsistent with the foregoing averments, not expressly admitted.

For answer to the second count of plaintiff's petition defendant admits that plaintiff resided and did business at Scranton, Iowa, as alleged; admits that the plaintiff shipped the grain mentioned in the exhibit to the second count, to Chicago at the time therein named, at the price named.

Defendant denies each and every other allegation contained in the second count.

For further answer to said count, defendant avers that on the 17th day of February, 1883, as before stated, there was issued by the Fremont, Elkhorn and Missouri Valley Railroad, a through tariff from Nebraska points to the seaboard points above mentioned on corn and oats, which tariff was put in the hands of all agents on defendant's line in the State of Iowa, Clinton to Missouri valley, inclusive, and all shipments made from the above stations
19 over defendant's road were charged and billed according to this tariff.

Wherefore defendant prays judgment for its costs.

(Signed) N. M. HUBBARD,
Atty. for Deft.

STATE OF ILLINOIS, } ss.
COOK COUNTY. }

I, H. R. McCullough, being first duly sworn, on oath say that I am general freight agent of the Chicago and Northwestern Railway Company, that I have read the foregoing answer and know the contents thereof, and that the matters and things therein stated are true, as I verily believe.

(Signed) HIRAM R. MCCULLOUGH,

Subscribed in my presence and sworn to before me by the said H. R. McCullough this 21st day of July, 1890.

(Signed) J. L. McKittrick,
[SEAL.] *Notary Public.*

(Endorsed) In the Circuit court, United States Southern district, Iowa Central Div. *John Osborne* v. *C. & N. W. Ry. Co.* Answer filed July 24, 1890. Ed. R. Mason, clerk. N. M. Hubbard, atty. for deft.

20 UNITED STATES CIRCUIT COURT SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION.

John Osborne
vs.
Chicago and North-Western Railway Company. } *No. 3428, Law.*

AMENDED AND ADDITIONAL ANSWER TO PLAINTIFF'S PETITION.

The defendant, the Chicago and North-Western Railway Company, for amended and additional answer to plaintiff's petition, states:

That in the latter part of the year 1887, and the early part of the year 1888, secret rates were put in force by other railway companies from Nebraska points by way of St. Louis and Beardstown to Boston, New York, Philadelphia and Baltimore, which were lower than the rates from said points by way of the Fremont, Elkhorn and Missourir Valley Railroad, the Chicago and North-Western Railway, and railways running from Chicago to said eastern cities, and that the effect of such lower rates was to deprive the last named companies and this defendant of the transportation of all corn and oats destined from said Nebraska points to said seaboard points. That the secret rates so put in force by way of St. Louis and Beardstown aforesaid, were lower than reasonable rates, and, in order to secure any business in the way of transporting corn and oats from said Nebraska points to the seaboard points over the lines of this defendant, it became and was necessary to meet the secret rates so established by the way of St. Louis and Beardstown; and for that purpose the tariffs mentioned in the petition were
21 adopted by agreement between the Fremont, Elkhorn and Missouri Valley Railroad Company, the Chicago and North-Western Railway Company and railways running eastward from Chicago to said cities on the seaboard, and that such rates so adopted in said tariffs were substantially the rates which were put in force as aforesaid, by the way of St. Louis and Beardstown, and the difference in the rates so adopted by the lines by the way of St. Louis

and Beardstown, and the through tariffs adopted as aforesaid, by this defendant and other railways, and the rates charged by tariffs previously in force, was about ten cents per hundred pounds. And so this defendant denies that the shipments from said Nebraska points, and from points in Iowa to the seaboard cities aforesaid, were under like circumstances, and for a like contemporaneous service; and this defendant further denies that there was any unreasonable, unjust and unlawful discrimination as alleged in the first count of said petition.

Defendant further answering the first count of said petition, denies that under the said tariff of the defendant mentioned in the first count of said petition, defendant on and after the 30th day of December, 1887, up to and including the first day of February, 1888, did carry and transport corn and oats from Blair and other points in Nebraska, over its said road in Iowa to Turner Junction and Rochelle, Illinois, and through to the city of Chicago, Illinois, for the sum of eleven cents per hundred pounds.

Defendant further avers that nearly one-half of the earnings of its Iowa lines is derived from business originating west of the Missouri river, and destined to points beyond the Missouri river, and that the joint tariffs made by the Fremont, Elkhorn and Missouri Valley Railroad Company, and this defendant and its eastern connections were reasonable and just under all the circumstances, and did not constitute an unjust discrimination in favor of Nebraska pro-
22 ducers as against the producers of Iowa; because, whatever discrimination was created was done by the cut rate put in force by other lines going by way of St. Louis and Beardstown, as above mentioned.

Wherefore, defendant says that failing to put this tariff at Nebraska points in force in Iowa did not constitute a violation of either the third or the fourth section of the Inter State Commerce Act, as alleged by plaintiff in his first and second counts of said petition.

(Signed) W. C. GOUDY,
N. M. HUBBARD,
Attorneys for Defendant.

I, H. R. McCullough, being duly sworn, on oath say that I am the general freight agent of the defendant railway company, that I have read the foregoing answer, that I have better knowledge of the facts and matters therein set forth than any other officer or agent of said company, and that such facts and matters are true as I verilybelieve. (Signed) H. R. MCCULLOUGH.

Subscribed and sworn to in my presence and before me this 22d day of October, 1891.

(Signed) E. R. MASON,
Clerk.

(Endorsed): 3,428. John Osborne *vs.* C. and N. W. Ry. Amended and additional answer. Filed by leave of court, Oct. 22, 1891. E. R. Mason, clerk. W. C. Goudy, N. M. Hubbard, Atty. for deft.

23 IN THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

The Chicago and North-Western Railway Company,
Plaintiff in Error,
vs.
John Osborne,
Defendant in Error.

Petition for Writ of Error.

To the Honorable O. P. Shiras, United States District Judge for the Northern District of Iowa, and presiding judge at the October term, 1891, of said United States Circuit Court:

Your petitioner, the Chicago and North-Western Railway Company, respectfully states that at the October term, 1891, of said United States Circuit Court for the Southern District of Iowa, Central Division, there was tried a case then and there pending, wherein John Osborne was plaintiff, and your petitioner was defendant, in which a verdict and judgment was then and there rendered and entered in favor of said John Osborne and against your petitioner, in the sum of two hundred and twenty-five dollars ($225) and for costs and attorney's fee.

And your petitioner has filed herewith in the office of the clerk of said United States Circuit Court an assignment of errors in said cause, as required by the rules of the United States Circuit Court of Appeals for the Eighth Circuit, and now here brings its supersedeas bond in the sum of one thousand dollars, with good and
24 sufficient surety, conditioned as required by law and the rules of said United States Circuit Court of Appeals.

Wherefore, your petitioner prays that a writ of error be granted directed to the judges of said Circuit Court of the United States for the Southern District of Iowa, Central Division, commanding that the record in said cause be certified to said United States Circuit Court of Appeals for the Eighth Circuit, and that a citation issue as provided by law, and that a stay of proceedings be ordered until said errors shall have been heard and determined.

(Signed)
THE CHICAGO & NORTH-WESTERN RAILWAY COMPANY.
By W. C. GOUDY AND HUBBARD & DAWLEY,
Its Attorneys.

A writ of error is hereby allowed as prayed in the foregoing petition, this 27th day of November, 1891.

(Signed) O. P. SHIRAS,
Judge.

Endorsed: C. & N. W. Ry. Co., plff. in error, *vs.* John Osborne, deft. in error. Petition for writ of error. Filed Nov. 23, 1891. Ed. R. Mason, Clerk.

KNOW ALL MEN BY THESE PRESENTS:

25 That we, the Chicago and North-Western Railway Company, as principal and Jas. L. Williams, of Marshalltown, Iowa, as surety are held and firmly bound unto John Osborne, in the full and just sum of one thousand dollars ($1,000,) to be paid to the said John Osborne, his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators and successors, jointly and severally by these presents.

Sealed with our seals, and dated this 10th day of November, in the year of our Lord, one thousand eight hundred and ninety-one.

WHEREAS, lately at the October, 1891, term of the United States Circuit court for the Southern District of Iowa, Central Division, in a suit pending in said court between John Osborne, plaintiff, and the said Chicago and North-Western Railway Company, defendant, judgment was rendered against the said Chicago and North-Western Railway Company, and the said Chicago and North-Western Railway Company has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John Osborne, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said Chicago and North-Western Railway Company shall prosecute said writ-of-error to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue. (Signed)

26 THE CHICAGO AND NORTH-WESTERN RAILWAY COMPANY
Principal.
By HUBBARD AND DAWLEY,
Its Attorneys.
JAMES L. WILLIAMS, *Surety.*

STATE OF IOWA, }
MARSHALL COUNTY, } ss.

I, James L. Williams, being duly sworn, on oath say that I am the surety named in the foregoing bond; that I am a resident of the State of Iowa; that I am worth over and above all my liabilities, the sum of two thousand dollars ($2,000.) and have property in the State of Iowa not exempt from execution of the value of one thousand dollars. (Signed)

JAMES L. WILLIAMS.

Subscribed in my presence and sworn to before me by the said James L. Williams, this 10th day of November, 1891.

(Signed)
F. S. WILLIAMS,
(SEAL.) *Notary Public in and for said county.*

Endorsed *C. & N. W. Ry. Co.*, plff. in error v. *John Osborne*, deft. in error—supersedeas bond. The within bond is hereby approved, to operate as a supersedeas, this 27th day of November, 1891. O. P. Shiras, Judge. Filed December 3, 1891, Ed. R. Mason, clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
27 SOUTHERN DISTRICT OF IOWA.

John Osborne
vs.
Chicago and North-Western Railway Company.

ERROR ASSIGNED BY THE PLAINTIFF IN ERROR.

And now comes the Chicago and North-Western Railway Company, plaintiff in error, and says that manifest error hath intervened in the proceedings of which the foregoing is a copy, to its damage, and it assigns the following as errors:

First. The Circuit court erred in excluding from the jury all of the testimony which tended to show dissimilar circumstances and conditions at points and stations on the Fremont, Elkhorn and Missouri Valley Railroad in Nebraska from those at the points and stations on the Chicago and North-Western Railway in Iowa.

Second. The court erred in refusing to give to the jury as a part of its charge the following instructions and each of them:

7. The defendant claims that the circumstances and conditions at the points in Nebraska named in the tariffs mentioned in the peti-

tion were substantially different from those at Scranton and other stations in Iowa on its main line, and that this difference justified
28 the railway company in transporting corn and oats from Nebraska points at a lower rate than from such Iowa stations, and evidence has been introduced tending to support the defendant's contention. This is a question of fact to be decided by the jury from all the evidence, and if they shall be satisfied from the testimony that the circumstances and conditions were not substantially similar, that is a legal excuse for the defendant to charge a greater compensation for a shorter than for a longer distance, although Scranton is on the same line and in the same direction; and if they so find, then the defendant has not been guilty of unjust discrimination.

8. The substance of the plaintiff's complaint is that the defendant made a rate from Nebraska points to the seaboard cities on corn and oats which was lower than the rates to the same seaboard cities from Scranton and other points in western Iowa, and that the shipments from Nebraska and Iowa were for a like and contemporaneous service and under substantially similar circumstances and conditions. The defendant claims that the circumstances and conditions were not substantially similar, and, therefore, the Nebraska rate as shown by the testimony does not constitute a violation of the Interstate Commerce Act which prohibits a charge of a greater rate for a shorter haul over the same line in the same direction.

Whether the circumstances and condition of the haul are substantially alike is a question of fact for the jury to decide from all the testimony. Evidence has been introduced tending to show that a secret rate was made from the Nebraska points where the tariffs in controversy were put in force, whereby corn and oats were diverted from the lines of the Elkhorn and of the defendant's road to other lines of railway by way of St. Louis and Beardstown, Illinois
29 Mere competition alone between rival and competing lines of railway is not sufficient to create the dissimilar circumstances and conditions contemplated by the Interstate Commerce Act, but the competition must be of such a nature as to be destructive of legitimate competition. If you find from the testimony that the open, published rate on corn and oats from Nebraska points to the seaboard cities by way of the defendant's lines to Chicago, and by way of St. Louis and Beardstown were substantially the same, and that by a secret or manipulated rate parties shipping by way of St. Louis and Beardstown were enabled to pay a sum substantially greater per bushel for corn and oats, and that thereby the corn and oats on the line of the Fremont, Elkhorn & Missouri Valley Railroad was diverted from the route by way of Chicago so as to destroy legitimate competition, the question is submitted to you whether the defendant was justified under the law in putting the

tariff in force in Nebraska and not putting the same in force at Scranton and other Iowa points.

Third. The court erred in giving to the jury the following portions of the charge:

"Evidence has been introduced in the case, upon which the court has been asked to submit to the jury, for your determination as a matter of fact, whether the defendant railway company was not justified in making the reduction of rates by reason of the fact that it appeared, as it is claimed, under the evidence, that there had been what was called a secret cut rate put in operation in Nebraska which affected business upon the line of the Fremont, Elkhorn and Missouri Valley and the Chicago and North-Western Railway, the result of this better rate being to cause quite a large portion of the business that would naturally be tributary to the Chicago and
30 North-Western line to go south by way of St. Louis and Beardstown, and in that way through St. Louis and these southern points to the eastern seaboard. Under the ruling of the court upon the question of law, although a rate of that kind may have existed, it is the view of the court that that question cannot be determined by this court and jury. The consideration of questions of that kind, of the right of the railway company to be excused from the duty and obligation that is placed upon it by the fourth section of the inter-state commerce law, is, by the express terms of the law itself, conferred upon the Inter-State Commerce Commission. As you know, there is a body of commissioners provided for by this inter-state commerce act, and the fourth section of this act, by its express terms, in a proviso that is therein contained, places upon the commission the duty and gives them the authority to investigate and determine whether there are such facts and circumstances surrounding a railroad at a given time as would justify the commission in authorizing the railway company to charge a greater sum for a shorter than for a longer haul over the same line in the same direction, under otherwise substantially similar circumstances. In the view that the court takes of it, this court and jury cannot determine that question, which, by the law, the commission is authorized to determine. Whether the railway company was justified by a cut rate, making what was called in argument 'illegitimate competition,' and circumstances of that kind which grow out of the handling and management of the railroad business of the country, by other competing lines, and its effect upon the business of the defendant company, in the judgment of the court, are questions that cannot be committed to you."

31 "Now, then, if the railway company had been authorized by the commission to do that, then they could plead and prove that fact, and it would then be the duty of the court to instruct the jury that that would justify the railway company in making the

larger rate for the shorter distance; but no such action has been taken by the Interstate Commission: they have not been called upon to act, and they have not authorized the railway company to charge a greater sum for the shorter than for the longer distance. Under the circumstances I have detailed before you, as I view it, this court and jury cannot authorize the railway company to make such charge or justify it after it has been done."

Fourth. The court erred in refusing to give the instructions numbered 1 and 2, as prayed, and each of them, which read as follow:

1. The plaintiff has alleged in both counts of his petition that the Chicago and North-Western Railway Company was a common carrier, engaged in the business of transporting freight over certain lines of railroad in Iowa, Illinois, and Nebraska, as owner or lessee, from points in Nebraska to Chicago, and the defendant in its answer has denied these allegations averring that the Fremont, Elkhorn and Missouri Valley Railroad Company is a separate corporation, under the law of Nebraska, and the Sioux City and Pacific Railorad Company is another separate corporation under the laws of the United States, each operating its own road, and that the defendant is not the owner or lessee of either. This is an issue of fact to be determined by the jury from the evidence.

2. The plaintiff alleges in the first count of his petition that the Chicago and North-Western Railway Company, on the 30th day of December, 1887, issued its tariff for the transportation of corn and oats destined for New York, Philadelphia, Boston and Balti-
32 more, at eleven cents per hundred, from Blair and other points in Nebraska to Turner Junction or Rochelle, and that in pursuance of said tariff, it did, during the month of January, 1888, transport corn and oats from Blair and other points in Nebraska to Turner Junction and Rochelle: and in the second count he alleges that the Chicago and North-Western Railway from the 17th day of February had in force a joint through tariff and carried corn and oats from Blair and other points in Nebraska. These allegations are denied by the answer, and it is averred that these tariffs were made by the Fremont, Elkhorn and Missouri Valley Railroad, the Sioux City and Pacific Railroad, the Chicago and North-Western Railway, and various lines running from Chicago east to the seaboard, and that under said tariffs, corn and oats were carried from points in Nebraska, by the Fremont, Elkhorn and Missouri Valley and Sioux City and Pacific Railroads, and not in that state by the defendant, the Chicago and North-Western Railway Company. This is an issue of fact to be decided by the jury from the evidence.

Fifth. The court erred in giving as a part of its charge to the jury, the following:

"So far as the matter of the rates from Blair and other points in Nebraska to Chicago being established by means of joint tariff arrangements between the defendant company and its connecting lines extending into Nebraska, that will not defeat the plaintiff's right of recovery, if the facts show that the defendant company was charging a greater sum for the like service at the same time and under the like circumstances for a shorter than a longer haul in the same direction over the same line on which it was carrying the grain shipped from Nebraska under the rates fixed by the joint tariff.

33 "What I mean to say is, that if, from the evidence in this case, and the instructions which shall be further given you by the court, you shall find that the Chicago and North-Western Railway Company had, by the entering into a joint tariff with the Fremont, Elkhorn and Missouri Valley Railroad Company and the Sioux City and Pacific Railroad Company, aided to put in operation tariff rates whereby the corn and oats could be shipped from Blair and other points in Nebraska, under the like circumstances and conditions as the corn and oats shipped from points in Iowa, through Iowa, to the city of Chicago, and that by the doing thereof a larger sum was charged for a shorter haul than for a longer haul over the same line in the same direction, then the Chicago and North-Western Railway Company, by joining in that tariff and by aiding in putting it in operation, has rendered itself liable to be called to account by any one who has suffered damage by reason of the Chicago and North-Western Railway Company's charging that person a larger sum for the shorter than for the longer haul.

"In other words, companies cannot escape the duty and obligation that is placed upon them by the provisions of the Interstate Commerce Law by entering into joint tariffs. Railroads have the right to enter into these joint tariff arrangements—the business of the country could not be carried on, probably, at least not with any success, unless it was done, and they have a perfect right to do it. But when they do it, the duty and obligation is on them to observe the provisions of the Interstate Commerce Law in making and putting into operation these joint rates. It is just as much a violation of the law to charge a larger sum for a shorter than for a longer haul under substantially similar circumstances, if it is done by the operation of a joint tariff, as it would be if it was done by the operation of a single tariff by a single road."

34 "The plaintiff set forth his cause of action in two counts in the petition. In both counts he charges that on certain dates that are named in the accounts that are attached to the petition, he forwarded certain grain, corn and oats, from Scranton, a station upon the line of the Chicago and North-Western Railway, through to Chicago, and that he was charged at that time a rate greater than the rate which the railway company was giving to its patrons or to

others at Blair and other points in Nebraska, a point which is at a distance greater than is Scranton from the terminal point, Chicago.

"Now, as I understand it, the question that you have to determine, under the evidence in the case, is whether that statement is true. Is it true that upon any one or more of the shipments that are set forth in the schedule annexed to the petition, the plaintiff was required to pay a greater sum than was being charged at that time by the defendant, the Chicago and North-Western Railway Company, for performing the like service for the transportation of other grain of the same kind—corn and oats—from points in Nebraska, over the same line in the same direction, passing through Scranton to the city of Chicago?"

"It is for you to determine, if there is any dispute in the evidence, whether the Nebraska grain passed over the same line, the Chicago and North-Western, that the freight did in going from Scranton, Iowa, to Chicago, Illinois."

"If, on the other hand, you find on this issue for the plaintiff; in other words, if you find that the Chicago and North-Western Railway Company did charge more for the transportation from Scranton to Chicago than it was charging at the same time for the transportation of like property under like circumstances from Blair and other points in Nebraska, that would justify you in finding upon
35 that issue for the plaintiff, and we then come to the rule of damages."

Sixth. The court erred in refusing to give to the jury the second clause of the third instruction asked by the defendant, as follows:

Second. Did the defendant refuse the rates of the tariffs of December 30, 1887, or of February 17, 1888, to the plaintiff for transportation from Scranton to any of the seaboard cities?

Seventh. The court erred in refusing to give to the jury, as prayed by the defendant, the following instruction:

9. Even if it was the legal duty of the defendant to carry the plaintiff's corn and oats from Scranton at rates not exceeding those specified in the joint tariffs, and the defendant failed to perform such legal duty, and that thereby there was an unlawful discrimination in favor of shippers from Nebraska points, yet the plaintiff cannot for that reason alone recover in this suit; but the jury must be convinced by the evidence that the plaintiff has suffered, himself, certain and direct damages by such failure of duty on the part of the defendant. The Act of Congress provides adequate remedies for the wrong inflicted upon the public by such unlawful act by fines and a resort to the Interstate Commerce Commission. The plaintiff can only recover the damages, according to the rules of law, which will make good his pecuniary loss. In order to enable the plaintiff to recover damages in this suit, the jury must be satisfied from the evidence that he shipped corn and oats from Scranton to

one of the seaboard cities at a higher rate than a rate fixed by the joint tariffs described in the petition, or that he offered to make such shipments and the defendant's agents refused to carry the same at a rate not exceeding the lowest rate mentioned in such tariffs;
36 and if they find that no such shipments were made and no such offer and refusal was made, then the plaintiff has not suffered damage so as to recover in this case.

Eighth. The court erred in giving as a part of its charge to the jury, the following:

"Take the number of hundred pounds of these shipments, as they are set forth in the schedules attached to the petition; ascertain the rates fixed by the tariff that you find defendant at that time had in force from Nebraska; take the difference between that and the rate actually charged the plaintiff, if there is any, and the difference is the damage per hundred pounds that has been caused the plaintiff."

Ninth. The court erred in declining to give the following instruction as prayed for by the defendant:

6. It was not unlawful for the defendant to charge and receive more for the transportation of corn and oats from Scranton to Chicago than it received as its proportion for shipments of the same kinds of grain from points in Nebraska to New York, or Boston, or Philadelphia, or Baltimore, on the joint tariffs set forth in the petition, and the plaintiff cannot recover because the defendant received eighteen cents per hundred pounds, even if the proportion of the defendant on such through shipments was a less sum.

Tenth. The court erred in declining to give, on the prayer of the defendant, the following instruction to the jury:

5. There is no question for the consideration of the jury as to whether eighteen cents per hundred for transporting corn and oats from Scranton, Iowa, to Chicago, was a reasonable charge, nor as to whether the difference between such rate charged the plaint-
37 iff and the proportion received for through transportation according to the tariffs mentioned in the pleadings, was a reasonable charge.

Eleventh. The court erred in not giving to the jury the following instruction as prayed for by the defendant:

4. The law in force in December, 1887, and January and February, 1888, did not require the defendant to place the joint tariffs mentioned in the petition at Scranton, either by posting or filing.

Twelfth. The court erred in entering judgment on the verdict.

Thirteenth. The proceedings of the Circuit court were otherwise informal, irregular and erroneous.

WHEREFORE, the plaintiff in error prays that the said judgment

of the Circuit court may be reversed, and the cause remanded for such further proceedings as to the court may seem proper.

(Signed) W. C. GOUDY and
HUBBARD & DAWLEY,
Attys. for Plaintiff in Error.

(Endorsed): John Osborne *vs.* C. & N. W. Ry. Co. Assignment of Errors. Filed Nov. 23, 1891. Ed. R. Mason, Clerk.

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38 UNITED STATES OF AMERICA.

To John Osborne, greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to writ of error filed in the clerk's office of the United States Circuit court for the Southern district of Iowa, Central Division, wherein the Chicago and North-Western Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable O. P. Shiras, Judge of the United States Circuit court for the Northern district of Iowa, assigned to Southern district of Iowa this 27th day of November, 1891.

O. P. SHIRAS,
Judge.

39 IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF IOWA.

John Osborne
vs.
Chicago & North-Western Railway Company.

BILL OF EXCEPTIONS.

Be it remembered that on the trial of the above entitled cause before the court and a jury, commencing October 22, 1891, the plaintiff, to maintain the issues on his part, offered in evidence a map of the State of Iowa, made by the railroad commissioners in 1889, which is marked "Plaintiff's Exhibit A," and it is agreed by counsel for the respective parties that said map may be referred to in the court of appeals or the Supreme court if this cause shall be

carried to said courts, or either of them, and used without copying the same in the transcript of the record.

The plaintiff then called F. D. Babcock as a witness, who testified that he resided at Ida Grove, Iowa, and was, in the years 1887 and 1888, buying and selling grain at Ida Grove, Arthur and Odebolt, in north-western Iowa, and also in Nebraska.

On the 3d of January, 1888, he had a conversation with H. R. McCullough, General Freight Agent of the Chicago & North-Western Railway Company, when Mr. McCullough gave him a copy of a tariff (marked "Exhibit B") and told him that it was good
40 from Nebraska points, but not from Iowa points. He further said that the rate from Rochelle to New York was 27½c., the same as the rate from Chicago to New York.

The witness bought a number of cars of corn at Scribner, Nebraska, and shipped the same on the fifth day of January, 1888, under that tariff.

The attention of the witness was called to a tariff marked "Exhibit E," and he said that corn was in the sixth class mentioned in that tariff.

The plaintiff then offered in evidence "Exhibit B" and "Exhibit E," which are as follows:

41 ("Exhibit B.")

1887.

C. N. W., G. F. D. No. 2,927. Superseding G. F. D. No. 2,724.

F. E. & M. V. & S. C. & P. G. F. D. No. 949, and G. F. D. No. 859, of 1887.

Chicago & North-Western Railway.

Fremont, Elkhorn & Missouri Valley and Sioux City & Pacific R. R's.

Joint Tariff on Corn and Oats, in carloads, taking effect December 30, 1887, to Rochelle, Ill., when destined to New York, Boston, Philadelphia, Baltimore.

From		Per 100 lbs.	From		Per 100 lbs.
Blair	Neb.	.11	Hunkins	Neb.	.16
Kennard	"	.11	Exter	"	.16
Arlington	"	.12	*Buxton	"	.16
Fremont	"	.13	Geneva	"	.16
Cedar Bluffs	"	.13	Octavia	"	.13
Colon	"	.13	David City	"	.14
Wahco	"	.13	Millerton	"	.14
Swedeburg	"	.13	Surprise	"	.14
Cresco	"	.13	Poston	"	.15

Davey	Neb.	.13	Thayer	Neb.	.15
*Little Salt	"	.13	Houston	"	.16
Lincoln	"	.13	York	"	.16
Morse	"	.13	Charleston	"	.16
Linwood	"	.13	Henderson	"	.16
Abie	"	.13	Stockham	"	.16
Skull Creek	"	.13	*Eldon	"	.16
Brainard	"	.14	Harvard	"	.16
Dwigdt	"	.14	Inland	"	.16
Bee	"	.14	Hastings	"	.16
Seward	"	.14	Nickerson	"	.13
Goner	"	.14	Hooper	"	.13
Beaver Crossing	"	.15	Scribner	"	.13
Snyder	"	.13	*Hadar	"	.15
Dodge	"	.13	Pierce	"	.15
Howells	"	.13	*Foster	"	.15
Clarkson	"	.13	Plainview	"	.15½
Leigh	"	.14	Creighton	"	.16
Creston	"	.15	Battle Creek	"	.15
*Brookfield	"	.15	*Meadow Grove		.15
Corn-Lea	"	.15	Burnett	"	.15½
Lindsay	"	.15	Oakdale	"	.16
Newman's Grove		.15½	Neligh	"	.16
42 Bradish		.16	Clearwater	"	.16
Albion	"	.16	Ewing	"	.18
Loran	"	.16	Inman	"	.18
Petersburg	"	.16	O'Neill	"	.19
Elgin	"	.16	Emmet	"	.19
Crowell	"	.13	Atkinson	"	.20
West Point	"	.13	Stuart	"	.20
Beemer	"	.14	New Port	"	.21
Wisner	"	.14	Bassett	"	.21
Pilger	"	.14	Long Pine	"	.22
Stanton	"	.14½	Ainsworth	"	.23
Norfolk	"	.15			

*Prepaid way-bill through to Rochelle, Ill, via Mo. Valley, at rates given above. For rates from Rochelle to Baltimore, Philadelphia, New York & Boston, see C. & N. W., G. F. D. No. 2,604 of Nov 25, 1887 * * * amendments or subsequent issues.

(Signed) H. R. McCULLOUGH,
G. F. A. * * *

K. C. MOREHOUSE,
G. F. A., S., C. & P. & F., E. & M. V. R. Rs.

(Ex. "E.")

43 C. & N. W., G. F. D. Canceling G. F. D. 1822. November 25, 1887.

CHICAGO & NORTH-WESTERN RAILWAY,
AND
Baltimore & Ohio Railway,
Chicago, St. Louis & Pittsburgh Railroad,
Chicago & Atlantic Railway,
Chicago & Grand Trunk,
Lake Shore & Michigan Southern R'y.,
Michigan Central Railroad,
New York, Chicago & St. Louis Ry.,
Pittsburgh, Ft. Wayne & Chicago Ry.

JOINT FREIGHT TARIFF,
FROM

Points in Illinois,
Enumerated
to
Eastern and Seaboard Points.
Taking effect November 25, 1887.
Henry C. Wicker,
Traffic Manager C. & N. W. Ry., Chicago.
C. H. Knapp,
First Ass't General Freight Agent C. & N. W. Ry., Chicago.
A. H. Pride,
General Eastern Agent C. & N. W. Ry.,
409 Broadway, New York.
H. R. McCullough, General Freight Agent C. & N. W. Ry., Chicago.
M. Hughitt, Jr., Division Freight Agent C. & N. W. Ry., Chicago.
Charles H. Wise, Gen'l New England Freight Agt. C. & N. W. Ry.,
5 State Street, Boston.

From

44

Almora, Aurora, Austin, Batavia, Carlton, Carpentersville, Clintonville, Cortland, Creston, DeKalb, Dundee, Earlville, Elburn, Elgin, Elmhurst, Elva, Freeman, Geneva, Gilbert's, Henrietta, Herbert, Huntley, La Fox, Lombard, Malta, Maple Park, Maywood, North Aurora, Oak Park, Prospect Park, Ridgeland, River Forest, Rochelle, Rollo, Shabbano Grove, Spring Valley, St. Charles, Sycamore, Triumph, Troy Grove, Turner, Wayne, Wheaton, Winfield.

To	Via	1	2	3	4	5	6
Albany,	Blue Line. Commercial Express Canada Southern Line Erie Despatch Great Western Despatch Great Eastern Line. Lackawanna Line	.725	.665	.50	.355	.31	.265
N. Y. N. Y.	Merchants Desp. Tran. Dairy Line Despatch Refrigerator Line, Nickel Plate Line Red Line, Traders Despatch West Shore Line						
Allegheny City, Pa.	Baltimore & Ohio Railroad New York & St. Louis Railway P., Ft. W. & C. Ry.	.485	.43	.315	.23	.20	.71

45

Blue Line,
Canada Southern Line,
Commercial Express,
Erie Despatch,
Great Western Despatch,
Lackawanna Line,
N. Y. Despatch Refrigerator Line,

Buffalo, N. Y.	Nickel Plate Line, Great Eastern Line, Red Line, Traders' Despatch, West Shore Line.						.482,	.43,	.315,	.23,	.20,	.17

Belvidere, Cherry Valley, Garden Prairie, Marengo, Rockford, Union.						Ashton, Dixon, Flagg, Franklin Grove, Freeport, Fulton, Jc. Galt, Morrison, Nochusa, Nelson, Pecatonica, Ridott, Rock Island Jc. Round Grove, Sterling, Union Grove, Winnebago.					
1	2	3	4	5	6	1	2	3	4	5	6
.815,	.745,	.56,	.395,	.345,	.295,	.865,	.795,	.61,	.435,	.375,	.315
.56,	.49,	.365.	.26,	.23,	.195	.61,	.54,	.415,	.30,	.26,	.215
.56,	.49,	.365,	.26,	.23,	.195	.61,	.54,	.415,	.30,	.26,	.215

46

From

Almora, Aurora, Austin, Batavia, Carlton, Carpentersville, Clintonville, Cortland, Creston, DeKalb, Dundee, Earlville, Elburn, Elgin, Elmhurst, Elva, Freeman, Geneva, Gilbert's, Henrietta, Herbert, Huntley, Lafox, Lombard, Malta, Maple Park, Maywood, North Aurora, Oak Park, Prospect Park, Ridgeland, River Forest, Rochelle, Rollo, Shabbana Grove, Spring Valley, St. Charles, Sycamore, Triumph, Troy Grove, Turner, Wayne, Wheaton, Winfield.

To	Via	1	2	3	4	5	6
Bellaire, Ohio.	Baltimore & Ohio Railroad. P., Ft. W. & C. Ry.	.485,	.43,	.315,	.23,	.20,	.17
Black Rock, N. Y.	Blue Line, Canada Southern Line, Great Eastern Line, Commercial Express, N. Y. Despatch Refrigerator Line.	.485,	.43,	.315,	.23,	.20,	.17
Baltimore, Md.	Baltimore & Ohio Railroad, Canada Southern Line, Empire Line, Erie Despatch, Great Western Despatch, National Line, Union Line, Nickle Plate Line.	.795,	.685,	.52,	.355,	.30,	.245

47		Erie Despatch Great Eastern Line Commercial Express Michigan Central & Erie										
	Hampton N. Y.	Lackawanna Line, N. Y. Despatch Refrigerator Line.	.71,	.63,	.475,	.335,	.295,	.25				

Belvidere, Cherry Valley, Garden Prairie, Marengo, Rockford, Union.						Ashton, Dixon, Flagg, Franklin Grove Freeport, Fulton, Fulton Jc., Galt, Morrison, Nachusa, Nelson, Pecatonica, Ridott, Rock Island Jc., Round Grove, Sterling, Union Grove, Winnebago.						
.1	.2	.3	.4	.5	.6	1,	2,	3,	4	5	6	
.56,	.49	.365,	.26	.23	.195	.61	.54,	.415,	.30,	.26	.215	
.56,	.49,	.365,	.26,	.23,	.195	.61,	.54,	.415,	.30,	.26,	.215	
.885,	.765,	.58,	.395,	.335,	.275,	93.5	81.5	.63	43.5	63.5	29.5	
.80,	.71.	.535,	.375,	.33,	.28,	.85,	.76,	58.5	41.5	.36	.30	

48						Almora, Aurora, Austin, Batavia, Carlton, Carpentersville, Clintonville, Cortland, Creston, DeKalb, Dundee, Earlville, Elburn, Elgin, Elmhurst, Elva, Freeman, Geneva, Gilbert's, Henrietta, Herbert's, Huntley, La Fox, Lombard, Malta, Maple Park, Maywood, North Aurora, Oak Park, Prospect Park, Ridgeland, River Forest, Rochelle, Shabbana, Grove, Spring Valley, Rollo, St. Charles, Sycamore, Triumph, Troy Grove, Turner, Wayne, Wheaton, Winfield					
To		Via				1	2	3	4	5	6	
	Boston Mass	Blue Line Canada Southern Line Commercial Express Erie Despatch Great Western Despatch, Lackawanna Line, Merchants Desp. Tran Dairy Line National Despatch Nickel Plate Line National Line Union Line Red Line Traders Despatch West Shore Line				.925,	.815,	.60,	.435,	.38,	.325	
	Corry Pa. Irvineton, Pa.	Empire Line,				.485,	.43,	.315,	.23,	.20,	.17	

Emporium, Pa.	Empire Line,	.59,	.52,	.385,	.28,	.245,	.21
49 Elmira N. Y.	Blue Line Canada Southern Line, Great Eastern Line, Commercial Express, Lackawanna Line, N. Y. Despatch Refrigerator Line Red Line	.65	.60	.45	.32	.28	.24
Hornellsville N. Y.	Erie Despatch Commercial Express Michigan Central & Erie	.615	.565	.425	.30	.265	.225

Belvidere, Cherry Valley, Garden Prairie, Marengo, Rockford, Union.

Ashton, Dixon, Flagg, Franklin Grove, Freeport, Fulton, Fulton Jc., Galt, Morrison, Nachusa, Nelson, Pecatonica, Ridott, Rock Island Jc., Round Grove, Sterling, Union Grove, Winnebago.

1	2	3	4	5	6	1	2	3	4	5	6
1.015	.895	.66	.475	.415	.355	1.065	.945	.71	.515	.445	.375
.56	.49	.365	.26	.23	.195	.61	.54	.415	.30	.26	.215
.68	.60	.445	.32	.28	.24	.73	.65	.495	.36	.31	.26
.74	.68	.51	.36	.375	.27	.79	.73	.56	.40	.345	.29
.705	.645	.485	.34	.30	.255	.755	.695	.535	.38	.33	.275

50

Almora, Aurora, Austin Batavia, Carlton, Carpentersville, Clintonville, Cartland, Creston, De Kalb, Dundee, Earlville, Elburn, Elgin, Elmhurst, Elva, Freeman, Geneva, Gilbert's, Henrietta, Herbert, Huntley, La Fox, Lombard, Malta, Maple Park, Maywood, North Aurora, Oak Park, Prospect Park, Ridgeland, River Forest, Rochelle, Rolle, Shabbana Grove, Spring Valley, St. Charles, Sycamore, Triumph, Troy Grove, Turner, Wayne, Wheaton, Winfield.

To	Via	1	2	3	4	5	6
	Blue Line, Commercial Express, Great Eastern Line, Empire Line, Merchants Desp. Train Dairy Line, Erie Despatch, Great Western Despatch,						

Jersey City N. J.	Lackawanna Line, Traders Despatch, Nickle Plate Line, Red Line, Union Line, N. Y. Despatch Refrigerator Line.						.825	.715	.55	.385	.33	.275
Mt. Morris, N. Y.	Great Eastern Line,						.59	.52	.385	.28	.245	.21

Belvidere, Cherry Valley, Garden Prairie, Marengo, Rockford, Union.							Ashton, Dixon, Flagg, Franklin Grove, Freeport, Fulton Jc., Galt, Morrison, Nachusa, Nelson, Pecatonica, Ridott, Rock Island Jc.. Round Grove, Sterling, Union Grove, Winnebago.					
51	1	2	3	4	5	6	1	2	3	4	5	6
	.915	.795	.61	.425	.365	.305	.965	.845	.66	.465	.395	.325
	.68	.60	.445	.32	.28	.24	.73	.65	.495	.36	.31	.26

Almora, Aurora, Austin, Batavia, Carlton, Carpentersville, Clintonville, Cortland, Creston, De Kalb, Dundee, Earlsville, Elburn, Elgin, Elmhurst, Elva, Freeman, Geneva, Gilbert's, Henrietta, Herbert, Huntley, La Fox, Lombard, Malta, Maple Park, Maywood, North Aurora, Oak Park, Prospect Park, Ridgeland, River Forest, Rochelle, Rollo, Shabbana Grove, Spring Valley, St. Charles, Sycamore, Triumph, Troy Grove, Turner, Wayne, Wheaton, Winfield.

To	Via											
New York, N. Y.	Baltimore & Ohio Railroad, Blue Line, Canada Southern Line, Commercial Express, Great Eastern Line, Empire Line, Erie Despatch, Great Western Despatch, Lackawanna Line, Merchants' Desp. Trans. Dairy Line, N. Y. Despatch Refrigerator Line, Nickel Plate Line, National Line, Union Line, Red Line, Traders Despatch, West Shore Line,						.825	.715	.55	.385	.33.	.275
52												

Portland, Me.	Blue Line, Canada Southern Line, Great Eastern Line, Nickel Plate Line, Red Line.	.925	.815	.60	.435	.38	.325

Belvidere, Cherry Valley, Garden Prairie, Marengo, Rockford, Union.

1	2	3	4	5	6
.915	.795	.61	.425	.365	.305
1.015	.895	.66	.475	.415	.355

Ashton, Dixton, Flagg, Franklin, Grove-Freeport, Fulton, Fulton Jc., Galt, Morrison, Nachusa, Nelson, Pecatonica, Ridott, Rock Island Jc., Round Grove, Sterling, Union Grove, Winnebago.

1	2	3	4	5	6
.965	.845	.66	.465	.395	.325
1.065	.945	.71	.515	.445	.375

53

Almora, Aurora, Austin, Batavia, Carlton, Carpentersville, Clintonville, Cortland, Creston, De Kalb, Dundee, Earlville, Elburn, Elgin, Elmhurst, Eloa, Freeman, Geneva, Gilbert's, Henrietta, Herbert, Huntley, La Fox, Lombard, Malta, Maple Park, Maywood, North Aurora, Oak Park, Prospect Park, Ridgeland, River Forest, Rochelle, Rollo, Shabbana, Grove, Spring Valley, St. Charles, Sycamore, Triumph, Troy Grove, Turner, Wayne, Wheaton, Winfield.

		1	2	3	4	5	6
Providence R. I.	Baltimore and Ohio Railroad Blue Line Canada Southern Line Merchants Disp. Trans. Dairy Line Commercial Express Erie Despatch Lackawanna Line National Despatch National Line Nickel Plate Line West Shore Line Red Line Union Line	.925	.815	.60	.435	.38	.325
Philadelphia Pa.	Blue Line Baltimore and Ohio Railroad Commercial Express Canada Southern Line Empire Line Erie Despatch Great Western Despatch Great Eastern Line	.805	.695	.53	.365	.31	.255

54

Lackawanna Line
Merchants Despatch Trans:
Dairy Line
N. Y. Despatch Refrigerator Line
Nickel Plate Line
National Line
Union Line
Red Line
Traders Despatch
West Shore Line

Belvidere, Cherry Valley, Garden Prairie, Marengo, Rockford, Union.						Ashton, Dixon, Flagg, Franklin Grove, Fulton, Fulton Jc., Galt, Morrison, Nachusa, Nelson, Pecatonica, Ridott, Rock Island Jc., Rounds Grove, Sterling, Union Grove, Winnebago.					
1	2	3	4	5	6	1	2	3	4	5	6
1.015	.895	.66	.475	.415	.355	1.065	.945	.71	.515	.445	.375
.895	.775	.59	.405	.345	.285	.945	.825	.64	.445	.375	.305

55

Almora, Aurora, Austin, Batavia, Carlton, Carpentersville, Cortland, Creston, DeKalb. Dundee, Earlville, Elburn, Elgin, Elmhurst, Elva, Freeman, Geneva, Gilbert's, Henrietta, Herbert, Huntley, La Fox, Lombard, Malta, Maple Park, Maywood, North Aurora, Oak Park, Prospect Park, Ridgeland, River Forest, Rochelle, Rollo, Shabbana Grove. Spring Valley, St. Charles, Sycamore, Triumph, Troy Grove, Turner, Wayne, Wheaton, Winfield.

To	Via.	1	2	3	4	5	6
Pittsburg, Pa.	Baltimore & Ohio Railroad, C., St. L. & P. Ry., New York & St. Louis Railway, National Line, L. S. & M. S. Ry., Union Line.	.485	.43	.315	.23	.20	.17
Richfield Springs, N. Y.	Great Eastern Line, Lackawanna Line, N. Y. Despatch Refrigerator Line.	.725	.665	.50	.355	.31	.265
	Blue Line, Canada Southern Line, Erie Despatch, Commercial Express, Red Line,						

	Rochester, N. Y.	Maine Central & Erie, Merchants Desp. Trans. Dairy Line, N. Y. Despatch Refrigerator Line, Nickel Plate Line, West Shore Line.	.59	.52	.385	.28	.245	.21
56	Syracuse, N. Y.	Blue Line, Canada Southern Line, Merchants Desp. Train Dairy Line, Nickel Plate Line, Red Line, West Shore Line.	.64	.56	.415	.30	.26	.225

Belvidere, Cherry Valley, Garden Prairie, Marengo, Rockford, Union.						Ashton, Dixton, Flagg, Franklin Grove, Freeport, Fulton, Fulton Jc., Galt, Morrison, Nachusa, Nelson, Pecatonica, Ridott, Rock Island Jc., Round Grove, Sterling, Union Grove, Winnebago.					
1	2	3	4	5	6	1	2	3	4	5	6
.56	.49	.365	.26	.23	.195	.61	.54	.415	.30	.26	.215
.215	.745	.56	.395	.345	.295.	.865	.795	.61	.435	.375,	.315
.68	.60	.445	.32	.28	.24	.73	.65	.495	.36	.31	.26
.73	.64	.475	.34	.295	.255	.78	.69	.525	.38	.325	.275

57

Almora, Aurora, Austin, Batavia, Carlton, Carpentersville, Clintonville, Cartland, Creston, De Kalb, Dundee, Earlville, Elburn, Elgin, Elmhurst, Elva, Freeman, Geneva, Gilbert's, Henrietta, Herbert, Huntley, La Fox, Lombard-Malta, Maple Park, Maywood, North Aurora, Oak Park, Prospect Park, Ridgeland, River, Forest, Rochelly Rollo, Shabbano Grove, Spring Valley, St. Charles, Sycamore, Triumph, Troe, Grove, Turner, Wayne, Wheaton, Winfield.

To	Via	1	2	3	4	5	6
Suspension Bridge, N. Y.	Blue Line Canada Southern Line Great Eastern Line N. Y. Despatch Refrigerator Line West Shore Line.	.485	.43	.315	.23	.20	.17
Salamanca, N. Y.	Erie Despatch Great Western Despatch	.485	.43	.315	.23	.20	.17
Tioga, Tioga Co., Pa.	Commercial Express Nickel Plate Line Erie Despatch Blue Line Red Line	.485	.43	.315	.23	.20	.245

Utica, N. Y.	Blue Line Canada Southern Line Merchants Despatch Trans. Dairy Line Nickel Plate Line Red Line West Shore Line	.795	.685	.52	.355	.30	.25
Washington, D. C.	Baltimore & Ohio Railroad Empire Line Union Line National Line	.71	.63	.46	.335	.295	.245
Wheeling, W. Va.	Baltimore & Ohio Railroad C. St. L. & P. Ry. P. Ft. W. & C. Ry.	.795	.685	.52	.355	.30	.17

58

59 The plaintiff then offered in evidence "Exhibit F," a tariff taking effect February 17, 1888, which is as follows, to wit:

60

Ex. "F."

1888.

C. & N. W. G. F. D. No. 743. S. C. & P. and F., E. & M. V. G. F. D. No. 232.

FREMONT, ELKHORN & MISSOURI VALLEY R. R.
SIOUX CITY & PACIFIC R. R. AND CHICAGO & NORTH-WESTERN RAILWAY.
JOINT TARIFF ON
CORN AND OATS.
IN CARLOADS.
TAKING EFFECT FEBRUARY 17, 1888.
TO
NEW YORK.

From		Per 100 pounds.	From		Per 100 pounds.
Blair,	Neb.		Brainard,	Neb.	
*Omaha Heights,	"		Dwight,	"	
De Bolt Place,	"		Bee	"	
Irvington,	"		Seward	"	.37½
Bennington,	"		Goner,	"	
Washington,	"		Beaver Crossing,	"	.33½
Kennard,	"		Hunkins,	"	
Arlington,	"		Exeter,	"	.39½
Fremont,	"		Buxton,	"	
Cedar Bluffs,	"		Geneva,	"	.39½
Colon,	"	.36½	Octavia,	"	.36½
Wahoo,	"		David City,	"	.37½
Swedeburg,	"		Millerton.	"	.37½
Caresco,	"		Surprise,	"	.37½
Davey,	"		Gresham,	"	.38½
*Little Salt,	"		Thayer,	"	.33½
Lincoln,	"		Hauston,	"	
Morse,	"		York,	"	
Linwood,	"		Charleston,	"	39½
Abie,	"		Henderson,	"	
Skull Creek,	"				
Stockham,	"	.39½	*Foster,	"	.40½
61 *Eldon,	"		Plainview,	"	.41½
Harvard,	"		Creighton,	"	.41½
Inland,	"		Battle Creek	"	.38½
Hastings,	"		*Meadow Grove,	"	.36½
Nickerson,	"	.36½	Burnet,	"	.40½
Hooper,	"	.36½	Oakdale,	"	.41½
Scribner,	"	.36½	Neligh,	"	.42½
Snyder,	"	.37	Clearwater,	"	.43½
Dodge,	"	.38	Ewing,	"	.44½
Howells,	"		Inman,	"	.45½
Clarkson,	"		O'Neil,	"	.46½
Leigh,	"		Emmett,	"	.46½
Creston,	"	.38½	Atkinson,	"	.47½
*Brookfield,	"		Stuart,	"	.47½
Cornlea,	"		Newport,	"	.48½
Lindsay,	"		Bassett,	"	.48½
Newman's Grove,	"	.38½	Long Pine,	"	.49½
Bradish,	"	.39½	Ainsworth,	"	.50½
Albion,	"	.39½			
Loran,	"	.40½			
Petersburg,	"	.40½			
Elgin,	"	.41½			
Crowell,	"	.37½			
West Point,	"	.38½			
Beemer,	"	.38½			
Wisner,	"	.38½			
Pilger,	"	.39			
Stanton,	"	.39½			
Norfolk,	"	.40			
*Hadar,	"	.40			
Pierce,	"	.40			

*Prepaid.

Rates to Philadelphia, Pa., .02 cents per 100 lbs. less than rates to New York, N. Y.

Rates to Baltimore, Md., .03 cents per 100 lbs. less than rate to New York, N. Y.

Way Bill through via Chicago.

(Signed) H. R. McCULLOUGH,
G. F. A. C. & N. W. Ry.,
Chicago, Ill.

K. C. MOREHOUSE,
G. F. A. S. C. & P. & F. E. & M. V. R. Rs., Mo. Valley, Iowa.

62 The witness then stated that the price of grain at points in Iowa was the Chicago price less the freight to Chicago, and was also the New York price less the freight to New York. The plaintiff then offered in evidence a tariff marked "Exhibit I" and stated that it was the tariff by which Iowa shippers shipped their corn over the defendant's road during January and February, 1888.

This exhibit is a tariff dated August 25, 1887, issued by the Chicago and North-Western Railway Company on freight between Chicago, Milwaukee, Racine, Racine Junction, Kenosha and stations in the State of Iowa, and in the same the rate on corn and oats from Scranton to Chicago and the other points named was eighteen cents per hundred pounds in car-load lots.

On cross-examination the witness said that the producer or farmer in Iowa did not get the Chicago price less the cost of transportation for his grain that the dealer had bought from the farmer; he paid some less in order to make a profit in his business. It sometimes happened that the dealer paid more than the Chicago price, less the amount paid for transportation, and sometimes less.

Plaintiff then called Mr. JOHN OSBORNE who testified that he was the plaintiff, that he resided at Scranton, Green county, Iowa, and was engaged in the business of buying grain in 1887 and 1888 for the purpose of shipment. He did not buy with reference to any particular market, but Chicago was the main one. He had been doing business at Scranton continuously since 1877.

The plaintiff testified that he did not have any knowledge of the rates specified in the tariff of December 30, 1887, "Exhibit B"
63 and the tariff taking effect February 17, 1888, "Exhibit F" until the 24th day of February, 1888. That prior to that time the only rate that he had knowledge of was the eighteen cent rate from Scranton to Chicago as specified in the tariff marked "Exhibit I." The agent of the railway company at Scranton was E. R. Crane. The plaintiff had never prior to the 24th of January, 1888, asked the agent for any other rates than those in the tariff of August 25, 1887. He never spoke to him or had any conversation with him on the subject before that time.

On the 24th of February, 1888, the plaintiff received instructions from his commission house in Chicago, W. S. McCrea & Co., how to ship through to the seaboard. On the next day, the 25th, he went to the agent at Scranton, showed him the instruction and told him he wanted the grain shipped in that way. The agent replied that he did not know anything about the tariff, but he would ship it as desired. Between that time and the 1st of March he shipped thirteen cars to Boston according to the rate specified in the tariff "Exhibit B."

On the cross-examination the plaintiff testified that the thirteen

cars shipped to Boston were at the rate of 41½c per hundred pounds, and this was the rate he paid.

He further testified that he did not ship any grain from Scranton to Boston, New York, Philadelphia or Baltimore during the months of January or February, 1888, of that year prior to the 25th of February. He did not make any shipment during the year 1887 to either of these seaboard cities from Scranton, but since the 1st of March he had made such shipments through to the seaboard cities. He did not know what became of his grain which he shipped in January, 1888, to Chicago after its arrival there. It was con-
64 signed to W. S. McCrea & Co.; they disposed of it. He also testified that the price of grain at Scranton was governed principally by the Chicago market; this was the price in Chicago less the freight.

E. P. PHELPS was called as a witness by the plaintiff and testified that he resided at Scranton, Iowa, and was engaged in business at that place in buying and shipping grain during the years 1887 and 1888, and had been in such business since 1876. He was acquainted with E. R. Crane, the agent of the Chicago and North-Western Railway Company at Scranton. He was shipping grain from that station during January and February of 1888. He had no occasion to inquire for the rates on freight to the eastern points shipped all the time and making inquiry for rates during that time until the latter part of February. He then learned from Mr. Osborn, the plaintiff had rates the witness had not, which was near the end of February. He called upon the agent and inquired if Osborn was getting the benefit of a through rate that he was not receiving. The agent told him that Osborn was not, that he knew of. The agent said that he had billed some grain according to the instructions given him by Mr. Osborn, which he had received from W. S. McCrea & Co. The witness had never seen at the station in Scranton a tariff like "Exhibit F." He had paid the shipments during January and February, 1888, eighteen cents per hundred pounds to Chicago.

On cross-examination the witness said that he had brought a suit like the one on trial to recover from the Chicago and North-Western Railway Company for the same reasons involved in this case, and that his suit was pending in the court.

65 HENRY PRUSS was called as a witness for the plaintiff, and testified that he resided at Glidden, and for thirteen years had been a grain and stock shipper from there. Glidden was ten miles west of Scranton on the North-Western road. He was doing business in January and February, 1888, buying and shipping grain on the

defendant's railway. He had no knowledge of any through rate of 36 1/2 c. to New York, or other rate on grain to Rochelle or Turner Junction at 11c. during those months. He heard of it after the tariff had expired. He paid 19c. per hundred pounds for shipping his grain from Glidden to Chicago, and it was shipped according to the tariff marked Exhibit I. The witness had no conversation with the agent who was at Glidden, in regard to those through or special rates.

On cross-examination the witness said that he was plaintiff in a suit like this, which was pending in this court against the defendant.

E. M. PARSONS was called as a witness by the plaintiff, and testified that he resided at Carroll, Iowa. Since 1877 he had been engaged in the business of buying and shipping grain. He said the price was governed usually by the Chicago market. The value of the corn was the Chicago price less the freight to Chicago. During January and February, 1888, he was in the office of the North-Western Railway Company at Scranton nearly every day. He saw a similar tariff to that marked "Exhibit B" in the forepart of January in the hands of Mr. Babcock. The witness had a conversation with the agent at that station in February after the 17th. He told the agent that he had seen a tariff that made 36 1/2c. the rate from Blair to New York, and demanded that rate for shipping his corn. The agent said that there was no such rate that he
66 knew anything about. He had examined the tariffs that were on file at that station and did not see any such tariff as "Exhibit B" or "Exhibit F" among those files.

On cross-examination he said that the conversation with the agent was had the same day that he saw the tariff marked "Exhibit B" in the hands of Mr. Babcock, and that was the forepart of January.

The witness had brought the same kind of a suit against the defendant that had been brought by Osborn, the plaintiff, and his suit was pending in the court, not tried.

On re-direct examination he said that he had a second conversation with the agent about the 20th of February with reference to the tariff marked "Exhibit F." He examined the files of tariffs as late as the 28th of February, but did not find either of these tariffs marked "Exhibit B" or "F" among them.

H. A. JUNOD was called as a witness by the plaintiff, and testified that he had resided at Carroll, Iowa, for the last six years, and was a grain dealer. He was engaged in that business in January and February, 1888, and was frequently during that time at the office of the railway company's agent; was there every day and some-

times two or three times a day. He examined the freight tariffs on file and never saw that marked "Exhibit F." He had seen the tariff marked "Exhibit B" in the hands of Mr. Babcock in January. He had never seen the one marked "Exhibit F" that he knew of; he heard of it some time after the 27th day of February from W. S. McCrea & Co., his commission house in Chicago.

67 On cross-examination the witness stated that he had commenced a smilar suit to this on a like claim and obtained judgment, but he had not been paid anything on such judgment.

F. D. BABCOCK was recalled by the plaintiff, and testified that Turner Junction was about thirty miles west of Chicago on the North-Western road; that it had none of the facilities of a grain market, and had a population of between 1,000 and 2,500. Rochelle is seventy miles west of Chicago, on the North-Western road, and has no grain market there except for country produce. The Chicago, Burlington and Quincy railroad crosses the North-Western at Rochelle and also at Turner Junction. The Sioux City and Pacific Railroad Company operates the railroad from Blair, Nebraska, to Missouri Valley, on the North-Western road, a distance of about thirteen miles.

JOHN OSBORN, the plaintiff, was recalled, and testified that there was no other railroad at Scranton except the defendant's; it was about nine miles to any other railroad, which was at Jefferson, a point east of Scranton.

The plaintiff further testified that he had on hand at Scranton on the 30th day of December about 30,000 bushels of corn and oats. The grain that he shipped during January and February principally came from what he had on hand at that time.

On cross-examination he testified that during January he received grain from the farmers in wagons; some of which was unloaded from the wagons into the cars, and this corn was not a part of that in the elevator on the 30th of December. All of the shipments were of shelled corn. He put corn and oats into the elevator during January, but could not tell how much that was without his books. He also had corn and

68 oats in the elevator between the 17th and 25th of February. There was never a day but corn was put in the elevator unless it was bad weather. The amount which was put in or shipped he could not tell without his books. He kept a book which showed the grain received, and another which showed the grain shipped, but he had no books showing what he had on hand on December 30th, 1887. He said that if he deducted the amount shipped from the amount received, it would give pretty nearly the amount on hand.

E. M. PARSON was recalled by the plaintiff, and testified that Turner Junction was thirty miles west of Chicago, and Rochelle about seventy miles. Rochelle had from 2,500 to 3,000 inhabitants; and Turner Junction, about 1,500. At Rochelle, they had a few small elevators, but none at Turner Junction.

The plaintiff then offered in evidence the schedules attached to the petition.

This was all the material evidence introduced on the part of the plaintiff.

K. C. MOREHOUSE was then called as a witness on the part of the defendant, and testified that he was the general freight agent of the Fremont, Elkhorn and Missouri Valley Railroad Company, and the Sioux City and Pacific Railroad Company, having his office in Omaha, Nebraska, where the general offices of these companies were located. These companies were under the management of H. G. Burt, as a general manager. The witness was the general freight agent of both of these companies.

The line of which the witness had charge as general freight agent intersected with the North-Western railway at Missouri Valley in Iowa. There was also a connection between the North-Western and the Sioux City and Pacific railway at Onawa; the main line of the
69 North-Western runs from Chicago to Council Bluffs. The railroad between Missouri Valley and Fremont belonged to the Sioux City and Pacific Railroad Company. It was a distance of thirty-seven miles, of which twenty-four miles was west from Blair. It was thirteen miles from Missouri Valley to Blair. He signed the tariff, which had been introduced in evidence, dated December 30, 1887, as the general freight agent for the Fremont, Elkhorn and Missouri Valley Railroad Company and the Sioux City and Pacific Railroad Company.

The witness testified that Rochelle was named as a point for the billing of grain from Nebraska points in the tariffs in effect January and February, 1888, for the same reason that East Clinton was selected in the making up of tariffs. East Clinton was selected because it was a Mississippi river point and took the St. Louis rate; the same rate from Nebraska points would apply to all stations to the Mississippi river between Dubuque and St. Louis. This was a basing point to which freight could be billed and rebilled. Rochelle was about the same distance and similarly situated in some respects as Beardstown, a point on the Chicago, Burlington and Quincy Railroad, by which route grain was shipped to the seaboard. And Rochelle was fixed so as to get the same rate east from Rochelle, that was in force from Beardstown to the seaboard cities.

An agreement was made by Mr. McCullough, the general freight agent of the Chicago and North-Western Railway Company with

agents representing the lines running east from Chicago to the seaboard cities in December, 1887, and it was a part of that agreement that the same rate should be charged from Rochelle to such cities as was charged from Chicago to the same cities, and that the North-Western was to receive a part of the rate so charged.

70 The witness was present when this agreement was made. The rates specified in the tariff of December 30, 1887, from Nebraska points to Rochelle was not all that was to be received for carrying grain to Chicago.

The attention of the witness was called to "Exhibit B," the tariff of December 30, 1887, and to the fact that only stations in Nebraska were named in it, and none in Iowa or east of the Missouri river, and he was asked whether that was the usual and customary way to make tariffs, and he said that it was. He said that it would have the effect of establishing the maximum rate which could be charged for shipments from intermediate points, although such points were not named in the tariff.

The witness was shown several joint tariffs issued by railway companies which named some of the stations on the line of one or more of such railroads, but did not name all the stations between the points of shipments and points of destination, and was asked whether that was the usual and customary way of making such tariffs, and he answered that it was and had been for many years, and that such usage and custom was in force in 1887 and 1888. He saw nothing peculiar in the tariff marked "Exhibit B."

The attention of the witness was called to the tariff marked "Exhibit B" of December 30, 1887, and asked whether there was any other tariff necessary as a part of that to establish the transportation rates through to New York, Boston, Philadelphia and Baltimore, and he answered calling attention to the language at the bottom of the tariff: "For rates from Rochelle to Baltimore, Philadelphia, New York and Boston, see C. & N. W. G. F. D. No. 2,604 and amendments or subsequent issues."

71 Witness was then shown "Exhibit E," the tariff of November 25, 1887, and asked if that was the tariff which the quotation he had made referred to, and he said that it was, and that it required both of these tariffs to fix rates from Nebraska points through to the seaboard cities. The tariff of December 30, 1887, "Exhibit B" was changed January 2, 1888. The change was in the rates east of Rochelle. The rate east of Rochelle was advanced two and a half cents per hundred pounds; that is the rate from Rochelle to New York of twenty-seven and a half cents was advanced January 2d, to thirty cents, and in like manner to the other seabord cities. This tariff of December 30, 1887, changed as mentioned, remained in force until January 15th or 16th, when the rate from Rochelle to New York was put back from thirty

cents per hundred pounds to twenty-seven and a half cents, and the like reduction made to the other cities. This through rate from Nebraska points to the seaboard cities remained in effect until January 31st.

The attention of the witness was called to a paper dated Chicago, January 14, 1888, signed H. R. McCullough, general freight agent, directed to agents, giving billing instructions, accompanying G. F. D. No. 207 of that date; a joint tariff G. F. D. No. 207 January 14, 1888, expiring January 31, 1888; to a tariff of the Chicago and North-Western on corn and oats in car loads, taking effect January 16, 1888, expiring January 31, 1888; a tariff headed 887 superseding G. F. D. No. 243, and to a joint tariff of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, Sioux City and Pacific Railroad Company and the Chicago and North-Western Railway Company on corn in car loads to Turner Junction when destined to New York, Philadelphia, Baltimore and Boston, taking effect January 15, 1888, expiring January 31, 1888. And the witness stated that these papers in connection with the tariff of December 30, 1887, and amendments to each, and the tariff of November 25, 1887, of the roads east of Chicago, were the tariffs under which the business of transporting corn and oats was conducted during
72 the last half of January, 1888.

The witness further testified as follows: At the time this tariff of December 30, 1887, which has been introduced in evidence, was arranged, the circumstances and conditions of the business in Nebraska were as follows:

We found our grain going away from us, being hauled by farmers to stations on other roads where they could get more money for it; and we also found that it went to St. Louis, nearly all of it. I know that I went to Chicago and talked with Mr. McCullough about it; was in there several times, and we also talked with the representatives of the eastern lines, showing what we lost by everything going around Chicago. The result was that we made up a set of figures—I think I made them up—which we thought would secure for our road its legitimate share of the business. This state of affairs commenced soon after the Interstate Commerce law went into effect. In November, 1887, it was nearly all going by the southern lines. By grain going away from us I mean that considerable amount of the grain which was naturally tributary to our stations went to stations on other roads, and what we did get in our elevators was loaded on the cars of the Fremont, Elkhorn and Missouri Valley and shipped to the nearest connection with the southern roads, which would be Wahoo or Lincoln. In the sixty days preceding January, 1888, we occasionally shipped a car over the Fremont, Elkhorn and Missouri Valley road by way of the Northwestern, but nothing to speak of. The volume of the business was

south and around us. During the same time there was shipped from the Elkhorn line by way of St. Louis and Beardstown, from October 1, 1887, to December 30, 1887, there were 446 cars; and from December 30, 1887, to January 31, 1888, 496 cars by the
73 southern route. Via Missouri Valley we transported east 300 cars from December 30, to January 31, 1887. During the first half of February to the 14th we shipped fifty-two cars via Missouri Valley, and from February 17th to March 1st, 976 cars were shipped over the Fremont and Elkhorn and the Chicago and North-Western, that was under the lowest tariff. By the southern routes I should say about half as much business was done.

When the rate was the same to the seaboard cities by the Chicago route and by the southern routes, in the division of business the North-Western road would get the business. The North-Western road is the more direct route to the seaboard cities from Nebraska than any road that would take it by way of St. Louis; it is the shortest line from Fremont and Nebraska to Chicago. It is my impression that Chicago is the largest grain market.

I was asked about making a joint rate with the Missouri Pacific. The rate made by my company did not make the low rates by way of St. Louis or Beardstown. The business was not withdrawn from the line of the Elkhorn by reason of the rates prevailing between points on the Fremont, Elkhorn on the route to St. Louis.

The defendant then offered in evidence tariffs referred to by witness, which read as follows:

74 ("Ex. 5.")

1888. C. & N. W. G. F. D. No. 243/

CHICAGO & NORTH-WESTERN R'Y.
GEN'L FREIGHT DEPT.
CHICAGO, January 14, 1888.

To Agents:

Billing instructions accompanying G. F. D. No. 207, of this date:
For Buffalo, way bill to Chicago, at 3 cents per 100 pounds.
For Philadelphia, way bill to Chicago, at 3 cents per 100 pounds.
For New York, way bill to Chicago, at 3½ cents per 100 pounds.
For Boston, way bill to Chicago, at 4½ cents per 100 pounds.
Noting through rates and divisions on your way bills care Chicago & Grand Trunk Ry., Chicago.

(Signed) H. R. MCCULLOUGH,
G. F. A.

"Ex. 6."

1888. G. F. D. G. F. D. No. 207.

CHICAGO AND NORTH-WESTERN RAILWAY
AND
CHICAGO AND GRAND TRUNK RAILWAY.
JOINT TARIFF ON
CORN AND OATS
IN CARLOADS.
TAKING EFFECT JANUARY 14, 1888.
EXPIRES JANUARY 31, 1888.
GOVERNED BY THE OFFICIAL CLASSIFICATION.

From
Turner and Rochelle, Ill.,
to

Buffalo, N. Y.	16	cents per 100 pounds.
New York, N. Y.	27½	" " " "
Boston, Mass.	32½	" " " "
Philadelphia, Pa.	25½	" " " "

Way-bill to Chicago care of the C. & G. T. Ry., as per instructions.

(Signed) H. R. McCULLOUGH,
G. F. A. C. & N. W. Ry.

D. BROWN,
A. G. F. A. C. & G. T. Ry.

south and around us. During the same time there was shipped from the Elkhorn line by way of St. Louis and Beardstown, from October 1, 1887, to December 30, 1887, there were 446 cars; and from December 30, 1887, to January 31, 1888, 496 cars by the
73 southern route. Via Missouri Valley we transported east 300 cars from December 30, to January 31, 1887. During the first half of February to the 14th we shipped fifty-two cars via Missouri Valley, and from February 17th to March 1st, 976 cars were shipped over the Fremont and Elkhorn and the Chicago and North-Western, that was under the lowest tariff. By the southern routes I should say about half as much business was done.

When the rate was the same to the seaboard cities by the Chicago route and by the southern routes, in the division of business the North-Western road would get the business. The North-Western road is the more direct route to the seaboard cities from Nebraska than any road that would take it by way of St. Louis; it is the shortest line from Fremont and Nebraska to Chicago. It is my impression that Chicago is the largest grain market.

I was asked about making a joint rate with the Missouri Pacific. The rate made by my company did not make the low rates by way of St. Louis or Beardstown. The business was not withdrawn from the line of the Elkhorn by reason of the rates prevailing between points on the Fremont, Elkhorn on the route to St. Louis.

The defendant then offered in evidence tariffs referred to by witness, which read as follows:

74 ("Ex. 5.")

1888. C. & N. W. G. F. D. No. 243/

CHICAGO & NORTH-WESTERN R'Y.
GEN'L FREIGHT DEPT.
CHICAGO, January 14, 1888.

To Agents:

Billing instructions accompanying G. F. D. No. 207, of this date:
For Buffalo, way bill to Chicago, at 3 cents per 100 pounds.
For Philadelphia, way bill to Chicago, at 3 cents per 100 pounds.
For New York, way bill to Chicago, at 3½ cents per 100 pounds.
For Boston, way bill to Chicago, at 4½ cents per 100 pounds.
Noting through rates and divisions on your way bills care Chicago & Grand Trunk Ry., Chicago.

(Signed) H. R. MCCULLOUGH,
G. F. A.

"Ex. 6."

1888. G. F. D. G. F. D. No. 207.

CHICAGO AND NORTH-WESTERN RAILWAY
AND
CHICAGO AND GRAND TRUNK RAILWAY.
JOINT TARIFF ON
CORN AND OATS
IN CARLOADS.
TAKING EFFECT JANUARY 14, 1888.
EXPIRES JANUARY 31, 1888.
GOVERNED BY THE OFFICIAL CLASSIFICATION.

From
Turner and Rochelle, Ill.,
to

Buffalo, N. Y.	16	cents	per	100	pounds.
New York, N. Y.	27½	"	"	"	"
Boston, Mass.	32½	"	"	"	"
Philadelphia, Pa.	25½	"	"	"	"

Way-bill to Chicago care of the C. & G. T. Ry., as per instructions.

(Signed) H. R. McCULLOUGH,
G. F. A. C. & N. W. Ry.

D. BROWN,
A. G. F. A. C. & G. T. Ry.

"Ex. 4."

75 1888. G. F. D. No. 267. Superseding G. F. D. No. 243 of 1888.

CHICAGO & NORTH-WESTERN RAILWAY.
TARIFF ON
CORN AND OATS
IN CARLOADS.
TAKING EFFCT JANUARY 16, 1888.
EXPIRING JANUARY 31, 1888.
WHEN DESTINED TO CLEVELAND, NEW YORK, PHILADELPHIA, BALTIMORE.

From					
Turner and Rochelle to Chicago for Cleveland	2¼	cents	per	100	pounds
Chicago to Cleveland	8¾	"	"	"	"
Through	11	"	"	"	"
Turner and Rochelle to Chicago for New York	3½	"	"	"	"
Chicago to New York	24	"	"	"	"
Through	27½	"	"	"	"
Turner and Rochelle to Chicago for Philadelphia	3½	"	"	"	"
Chicago to Philadelphia	22	"	"	"	"
Through	25½	"	"	"	"
Turner and Rochelle to Chicago for Baltimore	3½	"	"	"	"
Chicago to Baltimore	21	"	"	"	"
Through	24½	"	"	"	"

Way-bill to Chicago, care of Pittsburg, Ft. Wayne and Chicago Ry. Noting through rate and divisions on your way-bills.

H. C. WICKER, *T. M.* (Signed) H. R. MCCULLOUGH, *G. F. A.*

76 "Ex. 2."

1880.

C., St. P., M. & O. Ry., G. F. D. No. 89,
Superseding G. F. D. No. 72.

S. C. & P., G. F. D. No. 30.
Superseding G. F. D. No. 27.

C. & N. W., G. F. D. No. 193.
Superseding G. F. D. No. 158.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY.
SIOUX CITY AND PACIFIC R. R.
CHICAGO AND NORTH-WESTERN RY.
TARIFFS ON CORN CARLOADS.

TAKING EFFECT JANY. 15, 1888. EXPIRING JANY. 31, 1888.

TO

TURNER JUNCTION, ILLINOIS.
WHEN DESTINED TO
NEW YORK, BOSTON, PHILADELPHIA OR BALTIMORE.

From	Per 100 pounds.	From	Per 100 pounds.
Highland,	Neb. 12	Hartington,	Neb. 14
Herman,	" 13	Carroll,	" 14
Tekamah,	" 13	Randolph,	" 14
Craig,	" 13	Hope Siding,	" 14
Oakland,	" 13	Norfolk,	" 14
Lyons,	" 13	Simons Siding,	" 15
Bancroft,	" 13	Hubbard,	" 15
Bender,	" 13	Ponca,	" 15
Flournoy,	" 13	Summit,	" 15
Emerson,	" 13	Bradys Crossing,	" 15
Wakefield,	" 13	Coburn Junct.	" 15
Winside,	" 13	Dakota City,	" 15
Wayne,	" 13	Covington,	" 15
Concord,	" 14	Jackson,	" 15
Coleridge,	" 14		

Way-Bill through Via Blair.

JAS. T. CLARK, *G. F. A. C., St. P., M. & O. Ry., St. Paul.*

K. C. MOREHOUSE, *G. F. A. S. C. & P. Ry., Mo. Valley.*

H. R. MCCULLOUGH, *G. F. A. C. & N. W. Ry., Chicago.*

Corn Neb. Div. to Turner. 1888 { S. C. & P. R. R., G. F. D. No. 30. C. & N. W. Ry., G. F. D. No. 193. C., St. P., M. & O. Ry., G. F. D. No. 89.

77 The tariffs under which the business was done during January, 1888, terminated January 31, 1888. The tariff which took effect February 17, 1888, marked "Exhibit F," expired on the last day of February, and was not in force after that time.

J. C. HUNTER was called as a witness by the defendant, and testified that he was assistant freight auditor of the Chicago and North-Western Railway Company at Chicago, and had been in that office nearly eight years, as an assistant freight auditor since the beginning of last January. It was his business to see that the tariffs issued by the general freight department were properly enforced and the revenue properly divided.

There were no shipments made December 30, 1887, to January 1, 1888, inclusive, under the joint tariff marked "Exhibit B," from points in Nebraska. If there had been shipments of grain and oats in car-loads from Blair to Chicago, the amount to which the Chicago and North-Western Railway Company would have been entitled was 15.9 per hundred pounds from Blair to Chicago, and from Chicago to New York 22.6 per hundred pounds; if the destination was Boston, the rate from Blair to Chicago would have been 17½c and from Chicago to Boston 26c per hundred pounds.

During the period of time from January 2d to January 15th, the rate to which the Chicago and North-Western Railway Company was entitled on shipments made when destined to New York from Blair to New York was 17c per hundred pounds, and from Chicago to New York the rate of 24c per hundred pounds. If the grain was destined to Boston, the rate from Blair to Chicago was 18c per hundred pounds, and from Chicago to Boston 28c per hundred pounds; the aggregate from Blair to Boston was 46c; the aggregate from Blair to New York, 41c. Fifty-two cars were shipped between January 2d and January 15th, from Nebraska points under this tariff. On seventeen of these cars for New York the de-
78 fendant roceived 17c per hundred pounds for transportation from Nebraska to Chicago. On twenty-six cars to Boston the defendant received for transportation from Nebraska to Chicago 18c per hundred pounds.

Corn and oats were shipped under this tariff from January 16th to January 31, 1888. During that time the rate for transportation from Blair to Chicago, when the destination was New York, was 14½c per hundred pounds. The rate from Chicago to New York was 24c; the aggregate 38½c. If the destination was Boston, the rate from Blair to Chicago was 15½c, and from Chicago to Boston 28c; the aggregate 43c½; during that time 248 cars were shipped; eighty-five of which were to New York and 148 to Boston. On this business, the North-Western received on the grain sent to New York 17½ per hundred pounds from Cedar Bluffs, the nearest point to the Missouri river, from other points a larger sum. During the

period of time from February 17th to March 1st, under the tariff marked "Exhibit F," the defendant received 16¼c from Blair to Chicago, and the rate from Chicago to New York was 20¼c, making an aggregate of 36½c per hundred pounds. If the grain was destined to Boston, the rate from Blair to Chicago was the same, 16¼c, and from Chicago to Boston 25¼c, making the aggregate 41½c. 976 cars were transported under the tariff of February 17, 1888.

On cross-examination the witness stated that an account was kept in the auditor's office at Chicago which would show the proportion of those rates that was received by the Fremont, Elkhorn and Missouri Valley railroad and the Sioux City and Pacific Railroad. The rates mentioned by him from the Nebraska points to Chicago were
79 divided between these companies, but the witness could not tell the division, and did not recollect it. He could have ascertained it if he had examined in the office. He could not tell for certain what the per cent. was, but thought that it was about 12½ per cent. received by the roads west of the Missouri Valley; that is, 12½ of the 14½ rate from Blair to Chicago.

H. R. McCULLOUGH was called by the defendant, and testified that he was the general freight agent of the Chicago and North-Western Railway Company and had occupied that position for the last seven years. The railways of the Chicago and North-Western Railway Company were under his control as such general freight agent. He had no control over the business of the Fremont, Elkhorn and Missouri Valley Railroad Company nor of the Sioux City and Pacific Railroad. The Chicago aud North-Western Company's main line connected with the Sioux City ahd Pacific Railway at Missouri Valley. There were also connections of the North-Western and Sioux city and Pacific at Onawa, Iowa. The Chicago and North-Western has no connection whatever with the Fremont, Elkhorn and Missouri Valley Railroad. The Sioux City and Pacific connects with the Fremont, Elkhorn and Missouri Valley Railroad at Fremont, Nebraska.

The witness testified that he made an arrangement for the proportionate tariff introduced in evidence in this case dated December 30, 1887, marked "Exhibit B." Such arrangement was made with the representatives of the different railroads running east from Chicago to New York, Boston, Philadelphia and Baltimore. Rochelle was fixed as a point to which the grain under the tariff was to be billed and re-billed when destined to the seaboard cities. And the rate for transportation from Rochelle to such cities was about the same as from Chicago, but the Chicago and North-Western Railway Company was to receive a part of the rates charged from Rochelle to the eastern cities for transporting the grain from Rochelle to Chicago.

The rates for transportation from Rochelle eastward were
80 fixed by a joint tariff dated November 25, 1887, which has been introduced as evidence in this case as "Exhibit E." These two tariffs, that of December 30, 1887, "Exhibit B," and that of November 25, 1887, "Exhibit E," were to be put together in order to make one tariff for the transportation of grain from Nebraska points to New York, Boston, Philadelphia and Baltimore. The two combined would make the through tariff of December 30, 1887.

The witness identified the tariffs and papers connected therewith, introduced in evidence as Exhibits 2, 3, 4, 5 and 6, as those which had related to the business under the tariff of December 30, 1887.

The witness then testified that a notice dated January 10, 1888, was issued by him as general freight agent of the Chicago and North-Western Railway Company, and by Mr. Morehouse as the freight agent of the Elkhorn, and the same was offered in evidence as follows:

Ex. 28 A.

81 1888.

C. & N. W. G. F. D. No. 116. Amendment to G. F. D. No. 26,048, 2927 of 1887 & 67 of Jany. 2, 1888.

F. E. & M. V. G. D. No. 54. Amendment to G. F. D. No. 949 of 1887 & 41 of Jany. 2, 1888.

CHICAGO & NORTH-WESTERN RAILWAY.

FREMONT, ELKHORN & MISSOURI VALLEY AND SIOUX CITY & PACIFIC R. RS., JANUARY 16, 1888.

Referring to rates on corn and oats to Rochelle, Ill., when destined to New York, Boston, Philadelphia, Baltimore, &c., taking effect this date, the same rates will apply to Turner, Ill., and agents will way-bill to Turner instead of Rochelle, and will also send agent at Turner, by train mail, a tissue copy of each way-bill made.

The rates from Turner to New York, Boston, &c., will be the same as from Rochelle, as per F. E. & M. V. G. F. D. No. 41, C. & N. W. G. F. D. No. 67, dated January 2, 1888.

(Signed) K. C. MOREHOUSE,
G. F. A. F. E. & M. V. and S. C. & P. R. Rs.

H. R. MCCULLOUGH,
G. F. A. C. & N. W. Ry.

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82 The witness testified that there was not sufficient track room at Rochelle to receive and handle the cars that were sent under this tariff, and at the request of the superintendent of the Galena

division, the point to which the grain was to be billed was changed from Rochelle to Turner Junction, and the notice first introduced in evidence was issued to effect such change. In other respects the arrangement remained the same. By the arrangements made with the representative of the railroads running east from Chicago, the North-Western was to receive a per centage of the rate from Rochelle to the eastern cities for its haul from Rochelle to Chicago. He could not recollect what that per centage was. He furnished information as to what it was to the freight auditor's department of the North-Western in Chicago, and directed the proper division to be made in that office. When the change was made in the rates from Rochelle or Turner Junction eastward on business for January 16th, as shown by "Exhibit No. 5" introduced in evidence, he informed the freight auditor of such change.

Some testimony was given by the witness tending to show that he had instructed the head of the tariff department in his office to send the tariff of February 17, 1888, to the station agents in Iowa, but the defendant admitted in open court that such tariff had not been received by the agents in Iowa.

The witness testified that the Chicago and North-Western Railway Company was a corporation different from the Fremont, Elkhorn and Missouri Valley Railroad Company, and the Sioux City and Pacific Railroad Company was a third corporation distinct
83 from either one of the other two. Marvin Hughitt is the president of each of these companies, and the president appoints the general freight agent of each of them. The business of each of these companies is conducted separately from that of the other.

The witness further testified as follows: In the fall of 1887, the circumstances and conditions in regard to the transportation of corn and oats over the line of the Fremont and Elkhorn and the Sioux City and Pacific and the Chicago and North-Western by way of Chicago to the seaboard cities, and the transportation of the same kind of grain by way of St. Louis and Beardstown were as follows: The printed tariff rates on grain from points in Nebraska to eastern points were the same by way of St. Louis and Beardstown, and over the Chicago and North-Western by way of Chicago. If there is no disturbance in the rates, and no secret arrangement made, nearly all of the grain on the Fremont and Elkhorn road, as well as a large proportion of the grain on the Union Pacific and other roads in Nebraska, always finds a market over the Chicago and North-Western road by way of Missouri Valley and Chicago. In December, 1887, I found we were not getting any grain from points in Nebraska, and found, on investigating, that for a short time previous to that date, that between 400 to 500 cars of grain had been shipped from points on the Fremont road by way of St. Louis and

Beardstown. I found that these Nebraska shipments were going by way of St. Louis. I took what information I had, called on the Chicago representatives of the freight departments of the railroads running from Chicago to Boston, New York, Philadelphia and Baltimore, and showed them what I had; found they were fully advised relative to the secret rates being made on this grain by roads around Chicago, and found that they were perfectly willing to join the
84 Fremont and Elkhorn and the North-Western roads in meeting this competition, provided it could be done in a legal manner.

The defendant then offered in evidence the tariffs of December 30, 1887, and of November 25, 1887, which were the same heretofore offered in evidence by the plaintiff as Exhibits "B" and "E."

The defendant also introduced in evidence the notice of the advance in the east bound rates, dated December 22, 1887, marked Exhibit 30, and a tariff of January 2, 1888, marked Exhibit 31, which are as follows:

85 Ex. 30.

F. E. & M. V. G. F. D., 961.

Fremont, Elkhorn and Missouri Valley R. R.
and
Sioux City and Pacific R. R.
General Freight Department.

Mo. Valley, Iowa, Dec. 22, 1887.

Advance in East Bound Rates.

Taking effect January 2, 1888, the rates on 4th, 5th and 6th classes as named in C. & N. W. G. F. D., No. 2,604, of Nov. 25th, 1887, will be advanced to the basis of the following rates from Chicago to New York: 4—38½; 5—33; 6—27½. The rates to Boston will be as follows above the rate to New York, on 6th class, 5 cents per 100 lbs.

Governed by official classification.

Tariffs showing advanced rates will be furnished you at the proper time.

(Signed)

H. Cassidy, *A. G. F. A.*

K. C. Morehouse, *G. F. A.*

86 Ex. 31. two

C. & N. W. G. F. D., No. 67. F., E. & M. V. & S. C. & P. G. F. D., No. 41.

Amendment to C. & N. W. G. F. D. No. 2,604. Nov. 25, 1887.

CHICAGO & NORTH-WESTERN RAILWAY,
FREMONT, ELKHORN AND MISSOURI VALLEY RAILROAD,
AND
SIOUX CITY & PACIFIC RAILROAD.

JANUARY 2nd, 1888.

Referring to F., E. & M. V. & S. C. & P. G. F. D., No. 961, dated Dec. 22nd, 1887, giving notice of advance in rates on corn and oats in carloads, from Rochelle to seaboard points. The advance rates from Rochelle are as follows:

To		
New York	30	cents per 100 lbs.
Boston	35	" " " "
Philadelphia	28	" " " "
Baltimore	27	" " " "
Buffalo, N. Y.	18½	" " " "
Albany, "	28½	" " " "
Pittsburg, Pa	18½	" " " "
Rochester, N. Y	22½	" " " "
Syracuse, "	24	" " " "
Utica, "	27	" " " "
Portland, Me	35	" " " "
Providence, R. I	35	" " " "

Agents will Way Bill to Rochelle as per F., E. & M. V. and S. C. & P. G. F. D., No. 949; C. & N. W. G. F. D. No. 2,927, dated Dec. 30th, 1887. (Signed)

H. R. MCCULLOUGH, *G. F. A., C. & N. W. Ry.* K. C. MOREHOUSE, *G. F. A., F., E. & M. V. & S. C. & P. R. Rs.*

Amended by G. F. D. 116, 1/19/88.

ADVANCED RATES ROCHELLE TO BOSTON, &c.

87 The defendant then introduced in evidence the proceedings of the Interstate Commerce Commission held at the office of the Commission, in the city of Washington, on the 21st day of June, 1887, which read as follows :

" Present, all the commissioners :

The subject of the publication of joint tariffs being under consideration, the following preamble and order were unanimously adopted

and directed to be sent to all railroad companies subject to the 'Act to Regulate Commerce.'

WHEREAS, Section *6* of the 'Act to Regulate Commerce' authorizes the commission to direct when joint tariffs shall be made public, and to prescribe the measure of publicity to be given to the same :

It is ordered, as follows :

Joint tariffs of rates, fares, or charges, established by two or more common carriers for the transportation of passengers or freight passing over continuous lines or routes, copies of which are required by the sixth section of the 'Act to Regulate Commerce' to be filed with the commission, shall be made public so far as the same relate to business between points which are connected by the line of any single common carrier required by the first paragraph of said section to make public schedules of its rates, fares and charges. Such joint tariffs shall be so published by plainly printing the same in large type of at least the size of ordinary "pica" copies of which shall be kept for the use of the public in such places and in such form that they can be conveniently inspected, at every depot or station upon the line of the carriers, uniting in such joint tariff where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid."

88 Mr. Miller was called as a witness for defendant and testified as follows : I reside at Omaha, Nebraska, and have resided there about four years. Have been in the grain business for about fifteen years, buying for all the seaboard markets ; also for Chicago and St. Louis. I bought from the farmers, never from the grain dealers, and by the car load. In October, November and December I was located at Omaha, and buying in all the states and territories tributary to Omaha, Kansas, Iowa and Nebraska ; did an extensive business along the Fremont, Elkhorn and Missouri Valley road buying grain. I have bought and shipped over the Chicago and North western railroad to the seaboard ; began that late in December, 1887 ; prior to that time I could not buy anything to ship over the Northwestern to go east at all. It was sixty days from the time the new crop began to move until I could ship any over the Northwestern. During those sixty days my business in shipping grain averaged anywhere from 50 to 150 cars a day ; which were shipped over any road that got it to St. Louis ; was shipping to any market. The roads that took it to St. Louis were the Missouri Pacific and the Burlington.

In August and September, 1887 the rate paid by shippers from eastern Nebraska points to New York was forty-one and one-half cents. During those sixty days I was unable to ship grain over the North-Western; I cannot say positively what the rate was by way

of St. Louis. I could swear this. I could state that it was about three cents a bushel, equivalent to four cents a hundred less than the rate that was in use by way of the Chicago and North-Wertern; it would be about five cents a hundred less. I received my directions to ship from the houses for whom I bought grain; they were seaboard houses.

Q. In the spring of 1888, how did the rates compare through Iowa with those by way of St. Louis?

A. They are never the same; they are always lower by way of St. Louis.

89 Q. How much lower after March in the spring of 1888?

A. Sufficiently lower to take the Nebraska grain by way of St. Louis as against the eastern rates, whatever may have been necessary.

Have shipped over the North-Western east since then. I should judge I bought four thousand cars off the Elkhorn road in 1888; it all went by way of St. Louis, the North-Western didn't get any of the haul at all. Haven't shipped corn or oats from Nebraska over the North-Western since 1888; I could not do it. Am still engaged in shipping there; buy about five thousand cars a year.

The effect of the lower rate that was put in in the latter part of 1887 and first part of 1888, was to raise the price to the producer; not to the dealer.

Either the open or the secret rate from Nebraska to the seaboard or the closest market that is bidding for it, determines the price of grain in Nebraska.

Q. Do you know whether or not this low rate which prevailed in the latter part of 1887 and the early part of 1888 was a secret rate, or whether it was an open rate, and published, open to everybody?

A. It was a secret rate, it was not published at all. I did not learn it from any station agent; my knowledge of what the grain brought going to the markets for which it was bought told me what the rate was. From my experience in the grain business I could tell from the market price which I received for the grain what the rate was; it was equivalent to about five cents a hundrd less than the tariff rate, that is, that much less than the open

90 rate. There was an open rate by way of St. Louis, but they were not using it. During these sixty days I have spoken of, I shipped nothing at all over the Chicago and North-Western road.

Cross-Examination.

During January and February, 1888, I shipped both over the Chicago and North-Western road and by the southern route, andfor sixty days prior to the first of January, 1888, all my shipments were by way of St. Louis. I did not say that I had a secret rate that

was not published and not known to the public: I merely said I bought grain on such limits as the houses for whom I bought made me. I simply figured what the rate was from what the grain was worth at the markets for which it was bought, and what I paid at the point of shipment. I had instructions to pay a certain price, and I knew what the price was in New York, Philadelphia and Boston, and I then figured out that there must have been a secret rate given to the houses for whom I bought and shipped, because the price at which I bought and the price at which they sold only left a margin equivalent to a lower rate than the published rate of these roads. I had no real personal knowledge of the rate only so far as I have told you; only as I figured. All the houses that were buying by way of St. Louis got that secret rate; they bought at the same price. I know that because I came in competition with them every day.

Q. And did they get special rates?

A. I merely know from what they paid; from the offers made by other grain buyers which I examined, and which were from two to four cents more than the tariff rate would warrant.

The tariffs were just the same by way of St. Louis as by way of the North-Western; there was no cut rate to my knowledge so far as any published rate was concerned.

91 In the months of January and February, 1888, I shipped both over the North-Western and by way of St. Louis, but the stuff I shipped by way of St. Louis was not bought on the North-Western line nor on the line of the Elkhorn; it was bought on the Burlington and Missouri, the Missouri Pacific and the Union Pacific.

Q. And the grain you bought in Nebraska and shipped over the Chicago and North-Western was bought on the line of the Elkhorn road in January and February, 1888?

A. After the through tariff, the thirty-six and one-half cent rate went into effect. Whenever that tariff took effect then I turned my stuff all east. I don't know when that tariff did go into effect, but since the time it did, and I was enabled to ship my stuff east by the Chicago and North-Western, I did so.

I shipped under tariff Exhibit "B" from the time it took effect, and also under this Exhibit "F." I can only tell when I made the change in my shipments by when these tariffs went into effect. I gave the North-Western the benefit as soon as I could do so.

I do not know what roads my shipments by way of St. Louis reached the eastern markets. I will explain to you so you will understand; in Nebraska we buy everything based on the Mississippi river; then how the grain goes from there is another thing. I simply paid my price based there. I didn't use tariffs only to the river. I didn't know the tariff rates from St. Louis to New York.

Mr. SCHNEIDER, a witness on behalf of defendant, testified as follows:

I reside at Fremont, Nebraska; am engaged in the grain business and was so engaged in 1887 and 1888; operated at a number of points, but Fremont was our headquarters. Was one of the partners interested in buying. Our company was Nye, Wilson, Morehouse & Co., a corporation. Were buying for no partic-
92 ular markets; our principal shipments were made to St. Louis; none to the seaboard at that time. The great bulk of our purchases were direct from the farmers; during the latter part of 1887 and early part of 1888, we shipped on a joint rate between the Elkhorn road and the Missouri Pacific to St. Louis, and possibly some over the "Q." and the Burlington and Missouri. We made very few if any shipments over the North-Western by way of Chicago. I think the shipments we made to St. Louis were destined to the seaboard, but our billing did not show it at that time; have been in business along the Fremont and Elkhorn road a little more than ten years buying grain; commenced in 1870 some time. Prior to the fall of 1887 we shipped to Chicago via, Chicago and North-Western. Up to the fall of 1887 we had used that line during the existence of our business; practically nothing went to St. Louis; we came to ship to St. Louis in the fall of 1887, because we received more money for our sales of our grain; the difference of the price in St. Louis and if we had shipped to Chicago at the same time was two and one-half to three cents per bushel. We commenced to ship to St. Louis in the fall of 1887, with the first movement of the crop, the latter part of October or the first of November, and continued until about the middle of February. Between October and the middle of February we may possibly have shipped a few cars over the North Western when we could not get cars to ship to St. Louis and the elevator was full, and we had to make room for new receipts; but if we did, it was only under such conditions. After the middle of February we shipped over the Chicago and North-Western and continued to do so while the seaboard tariff was in effect by way of Turner Junction. We sold considerable to be shipped during that time. The price of corn shipped to St. Louis or Chicago was practically the same.

93 During the time I was shipping to St. Louis I didn't have any rate made to me other than the tariff rates. As a rule our grain was sold to St. Louis commission merchants. They were the only parties I dealt with. I do not know to whom they forwarded it. The only knowledge I had of a secret rate off the Elkhorn by way of St. Louis was that they would give me more for the grain

I saw the tariff giving this eleven cent rate to Rochelle early in January, 1888. I could not avail myself of it simply because the eleven cent rate and the 27½ cents out of Rochelle was higher up to the 31st than the other way.

This was all the material evidence offered on the part of the defendant.

The defendant requested the court to give the following instructions to the jury:

1. The plaintiff has alleged in both counts of his petition that the Chicago and North-Western Railway Company was a common carrier engaged in the business of transporting freight over certain lines of railroad in Iowa, Illinois and Nebraska, as owner or lessee, from points in Nebraska to Chicago, and the defendant in its answer had denied these allegations, averring that the Fremont, Elkhorn and Missouri Valley Railroad Company is a separate corporation, under the law, of Nebraska, and the Sioux City and Pacific Railroad Company is another separate corporation under the laws of the United States, each operating its own road, and that the defendant is not the owner or lessee of either. This is an issue of fact to be determined by the jury from the evidence.

2. The plaintiff alleges in the first count of his petition that the Chicago and North-Western Railway Company, on the 30th day of December, 1887, issued its tariff for the transportation of corn and oats destined for New York, Philadelphia, Boston and Baltimore at eleven cents per hundred from Blair and other points in Nebraska to Turner Junction or Rochelle, and that in pursuance of said tariff, did, during the month of January, 1888, transport corn and oats from Blair and other points in Nebraska to Turner Junction and Rochelle; and in the second count he alleges that the Chicago and North-Western Railway, from the 17th day of February, had in force a joint through tariff and carried corn and oats
97 from Blair and other points in Nebraska. These allegations are denied by the answer, and it is averred that these tariffs were made by the Fremont, Elkhorn and Missouri Valley Railroad, the Sioux City and Pacific Railroad, the Chicago and North-Western Railway and various lines running from Chicago east to the seaboard, and that under said tariffs corn and oats were carried from points in Nebraska by the Fremont, Elkhorn and Missouri Valley, and Sioux City and Pacific Railroads, and not in that state by the defendant, the Chicago and North-Western Railway Company. This is an issue of fact to be decided by the jury from the evidence.

3. The other issues of fact for the consideration and decision of the jury are these:

First. Were the shipments from points in Nebraska under sub-

stantially similar circumstances and conditions as those from Scranton, Iowa?

Second. Did the defendant refuse the rates of the tariffs of December 30, 1887, or of February 17, 1888, to the plaintiff for transportation from Scranton to any of the seaboard cities?

98 *Third.* If the jury find the foregoing issues of fact submitted to them for decision in favor of the plaintiff, then it will be necessary to consider the evidence as to his damages. If they find he has failed to prove any pecuniary loss, they will return a verdict for the defendant; but if otherwise, then they will fix the damages from the evidence according to the rules given by the court.

4. The law in force in December, 1887, and January and February, 1888, did not require the defendant to place the joint tariffs mentioned in the petition at Scranton, either by posting or filing.

5. There is no question for the consideration of the jury as to whether eighteen cents per hundred for transporting corn and oats from Scranton, Iowa, to Chicago, was a reasonable charge, nor as to whether the difference betweeen such rate charged the plaintiff and the proportion received for through transportation according to the tariffs mentioned in the pleadings, was a reasonable charge.

6. It was not unlawful for the defendant to charge and receive more for the transportation of corn and oats from Scranton to Chicago than it received as its proportion for shipments of the same kinds of grain from points in Nebraska to New York or Boston or Philadelphia or Baltimore, on the joint tariffs set forth in the petition, and the plaintiff cannot recover because the defendant received eighteen cents per hundred pounds, even if the proportion of the defendant on such through shipments was a less sum.

7. The defendant claims that the circumstances and conditions at the points in Nebraska named in the tariffs mentioned in the petition were substantially different from those at Scranton and other stations in Iowa on its main line, and that this difference

99 justified the railway company in transporting corn and oats from the Nebraska points at a lower rate than from such Iowa stations, and evidence has been introduced tending to support the defendant's contention. This is a question of fact to be decided by the jury from all the evidence, and if they shall be satisfied from the testimony that the circumstance and conditions were not substantially similar that is a legal excuse for the defendant to charge a greater compensation for a shorter than for a longer distance, although Scranton is on the same line and in the same direction; and if they so find, then the defendant has not been guilty of unjust discrimination.

8. The substance of the plaintiff's complaint is that the defendant made a rate from Nebraska points to the seaboard cities on corn and oats which was lower than the rates to the same seaboard

cities from Scranton and other points in western Iowa, and that the shipments from Nebraska and Iowa were for a like and contemporaneous service and under substantially similar circumstances and conditions. The defendant claims that the circumstances and conditions were not substantially similar, and therefore the Nebraska rate as shown by the testimony does not constitute a violation of the Interstate Commerce Act which prohibits a charge of a greater rate for a shorter haul over the same line in the same direction.

Whether the circumstances and conditions of the haul are substantially alike is a question of fact for the jury to decide from all the testimony. Evidence had been introduced tending to show that a secret rate was made from the Nebraska points where the tariffs in controversy were put in force, whereby corn and oats were diverted from the lines of the Elkhorn, and of the defendant's road to other lines of railway by way of St. Louis and Beardstown,
100 Illinois. Mere competition alone between rival and competing lines of railway is not sufficient to create the dissimilar circumstances and conditions contemplated by the Interstate Commerce Act, but the competition must be of such a nature as to be destructive of legitimate competition. If you find from the testimony that the open, published rate on corn and oats from Nebraska points to the seaboard cities by way of the defendant's lines to Chicago, and by way of St. Louis and Beardstown were substantially the same, and that by a secret or manipulated rate parties shipping by way of St. Louis and Beardstown were enabled to pay a sum substantially greater per bushel for corn and oats, and that thereby the corn and oats on the line of the Fremont, Elkhorn and Missouri Valley railroad was diverted from the route by way of Chicago, so as to destroy legitimate competition, the question is submitted to you whether the defendant was justified under the law in putting the tariff in force in Nebraska, and not putting the same in force at Scranton and other Iowa points.

9. Even if it was the legal duty of the defendant to carry the plaintiff's corn and oats from Scranton at rates not exceeding those specified in the joint tariffs, and the defendant failed to perform such legal duty, and that thereby there was an unlawful discrimination in favor of shippers from Nebraska points, yet the plaintiff cannot for that reason alone recover in this suit; but the jury must be convinced by the evidence that the plaintiff has suffered himself certain and direct damages by such failure of duty on the part of the defendant. The act of Congress provides adequate remedies for the wrong inflicted upon the public by such unlawful act by fines and a resort to the Interstate Commerce Commission. The plaintiff can only recover damages, according to the rules of law, which
101 will make good pecuniary loss.

In order to enable the plaintiff to recover damages in this suit,

the jury must be satisfied from the evidence that he shipped corn and oats from Scranton to one of the seaboard cities at a higher rate than a rate fixed by the joint tariffs described in the petition, or that he offered to make such shipments, and the defendant's agents refused to carrry the same at a rate not exceeding the lowest rate mentioned in such tariffs; and if they find that no such shipments were made, and no such offer and refusal was made, then the plaintiff has not suffered damage so as to recover in this case.

The court then gave the following instructions and charge to the jury:

"*Gentlemen of the Jury:*

The issues presented in the case on trial before you arise under the provisions of the act of Congress passed in February, 1887, and commonly known as the Interstate Commerce Law. As you know, the Congress of the United States, for the purpose of regulating the business carried on by the common carriers of persons and property by means of railways or by a combination of railway and water travel, has passed this act which regulates in certain particulars the carrying on of the passenger and freight business that exists between the different states and territories of the United States. The law, by its provisions, applies to interstate commerce, that is, commerce that is carried on between the states and territories of the United States.

"Section 2 of this act, in substance, prohibits the charging or collecting from any person or persons a greater or a less compensation for services rendered in the transportation of passengers or property than is charged or collected from others for the transportation of similar property under substantially similar circum-
102 stances.

"Section 3 of this act makes it unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any person, company, firm, corporation or locality over others, or to any particular description of traffic.

"Section 4 of the act, in substance, makes it unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation, of a like kind of property, under substantially similar circumstances for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, it being provided, however, that upon application to the commission appointed under the provision of this act, such commission may authorize the carrier to charge less for the longer than for the shorter distance, and in this way relieve the carrier from the operation of the provisions of section 4 of this act.

"In the case now under consideration, the plaintiff claims that the defendant company violated the provisions of this act and par-

ticularly the fourth section thereof, in that the company required him to pay a larger sum for the transportation of certain grain, to wit: Corn and oats, from the town of Scranton, a station on the defendant's line of railway in the State of Iowa, to the city of Chicago, Illinois, than the company was then charging for shipping the same kind of grain from Blair and other points in the State of Nebraska to Chicago, the latter being the longer distance. In the schedule attached to the petition the date of each shipment made by the plaintiff is set forth, with the number of pounds shipped and the rate charged, to wit: eighteen cents per hundred pounds, and the answer admits the statements thus made to be correct. On behalf of the plaintiff it is claimed that the rate thus charged him

103 was greater than that in force over the line of the defendant's road upon shipments made from Blair and other Nebraska points, the plaintiff has introduced evidence tending to show the rates charged from Blair and other points in Nebraska, and the excess thereof over the rates charged to plaintiff for shipment of the like kind of grain from Scranton to Chicago.

"On behalf of the defendant, it is denied that the rates charged for the tranportation of grain from the points named in Nebraska, in fact exceed that charged to plaintiff upon the shipments from Scranton, and defendant had introduced evidence tending to show the rates in force at the different times included in the controversy, and further claims that the rates in force from Blair and other points in Nebraska were the result of a joint tariff adopted by the Freemont, Elkhorn and Missouri Valley Railway Company and the Sioux City and Pacific Railway Company and the defendant railway company, and further pleads that the circumstances in existence in Nebraska were dissimilar from those existing in Iowa at the time the shipments in question were made, because there existed upon certain lines of railway running to St. Louis, Missouri and Beardstown, Illinois, and thence connecting with lines reaching the eastern seaboard a secret cut rate upon grain shipments, which resulted, in diverting from the defendant's line running through Iowa to Chicago, a large part of the business which properly belonged to it, the same being sent from points in Nebraska over the southern lines, and that it was to meet the competition, thus created that the so-called Nebraska tariff was put in force.

"So far as the matter of the rates from Blair and other points in Nebraska to Chicago, being established by means of joint tariff arrangements between the defendant company and its connecting lines

104 extending into Nebraska, that will not defeat the plaintiff's right of recovery, if the facts show that the defendant company was charging a greater sum for the like service at the same time, and under the like circumstances for a shorter than a longer haul in the same direction over the same line on which it

was carrying the grain shipped from Nebraska under the rates fixed by the joint tariff.

"What I mean to say, is that, if from the evidence in this case, and the instructions which shall be further given you by the court, you shall find that the Chicago and North-Western Railway Company had, by the entering into a joint tariff with the Fremont, Elkhorn and Missouri Valley Railroad Company and the Sioux City and Pacific Railroad Company, aided to put in operation tariff rates, whereby the corn and oats could be shipped from Blair and other points in Nebraska, under the like circumstances and conditions as the corn and oats shipped from points in Iowa, through Iowa to the city of Chicago, and that by the doing thereof a larger sum was charged for a shorter haul than for a longer haul over the same line in the same direction, than the Chicago and North-Western Railway Company, by joining in that tariff and by aiding in putting it in operation, has rendered itself liable to be called to account by any one who has suffered damage by reason of the Chicago and North-Western Railway Company's charging that person a larger sum for the shorter than for the longer haul.

"In other words, companies cannot escape the duty and obligation that is placed upon them by the provisions of the Interstate Commerce Law by entering into joint tariffs. Railroads have the right to enter into these joint tariff arrangements—the business of the country could not be carried on, probably, at least not with any success, unless it was done and they have a perfect right to do it. But when they do it, the duty and obligation is on them to observe the provisions of the Interstate Commerce Law in making and putting into operation these joint rates. It is just as much a viola-
105 lion of the law to charge a larger sum for a shorter than for a longer haul under substantially similar circumstances if it is done by the operation of a joint tariff, as it would be if it was done by the operation of a single tariff by a single road.

"Again, it appears in evidence that in making out the various tariffs or schedules of rates which have been put in operation from time to time, different points upon the defendant's road have been taken, as I understand the testimony of the witness, as the basis used in establishing the rates. By way of illustrating: they will figure from a certain point, like East Clinton on the Mississippi; they will take that as a basis; or, they will take Chicago as a basis for figuring on; they may take Turner Junction as a basis for figuring on; or, they may take Rochelle as a basis for figuring on. Now, that is a matter for the railway companies to decide for themselves for their convenience in making out the different schedules of rates. But whatever basis, or whatever point they may take as a basis for establishing rates, the duty and obligation is upon them that they shall not by this means evade the provisions of the law. They

cannot, by shipping to some point arbitrarily fixed by themselves—by naming the points where they shall cause their cars to be billed to, make a reduction by charging a rate to that point, and from there another rate to another point—they cannot in that way escape the consequence of the result of that arrangement, if it puts an undue burden upon any shipper.

"By way of Illustration, here is the Chicago and North-Western Railway that runs from Missouri Valley, through to Chicago and through Turner Junction and Rochelle, we will assume. Now then, if the Chicago and North-Western Railway Company, in making out its tariffs, takes Turner Junction, or Rochelle or any
106 other point on the way to Chicago as a point to figure from, it may do that; but it cannot, by doing that, justify itself in charging shippers in Iowa a greater sum for taking produce through to Chicago than it charges other parties shipping from Nebraska. That is to say, the duty and obligation, as I have already said to you, is on them not to make any unjust discrimination or give any undue preference to shipments made from special points or localities, or any undue preference to the shipments of one individual over another, nor of one kind of business over another. The general theory of the Interstate Commerce Law is that as near as it can be done, all localities and all individuals, substantially similarly situated, shipping freight over the same line of road, in the same direction, under substantially similar circumstances, shall have the same or properly proportioned rates.

"In other words, there must be no undue preference given to one individual over another, or one locality over another. It is just as much a violation of the law to do that by any method of adopting different points and billing cars to one point and then to another point on the line, as it would be a violation of the law to simply charge a greater sum for a less service of hauling from one point to another.

"The plaintiff sets forth his cause of action in two counts in the petition. In both counts he charges that on certain dates that are named in the accounts that are attached to the petition, he forwarded certain grain, corn, and oats, from Scranton, a station upon the line of the Chicago and North-Western Railway and through to Chicago, and that he was charged at that time a rate greater than the rate which the railway company was giving to its patrons or others at Blair and other points in Nebraska, a point which is at a distance greater than is Scranton from the terminal point, Chicago.

107 "Now, as I understand it, the question that you have to determine, under the evidence in the case, is whether that statement is true. Is it true that upon any one or more of the shipments that are set forth in the schedule annexed to the petition, the plaintiff

was required to pay a greater sum than was being charged at that time by the defendant, the Chicago and North-Western Railway Company for performing the like service for the transportation of other grain of the same kind—corn and oats—from points in Nebraska, over the same line in the same direction, passing through Scranton to the city of Chicago?

"Evidence has been introduced in the case, upon which the court has been asked to submit to the jury for your determination as a matter of fact, whether the defendant railway company was not justified in making the reduction of rates by reason of the fact that it appeared as it is claimed, under the evidence, that there had been what was called a secret cut rate put in operation in Nebraska, which affected business upon the line of the Fremont, Elkhorn and Missouri Valley and the Chicago and North-Western Railway, the result of this better rate being to cause quite a large portion of the business that would naturally be tributary to the Chicago and North-Western line to go south by way of St. Louis and Beardstown, and in that way through St. Louis and these southern points to the eastern seaboard. Under the ruling of the court upon the question of law, although a rate of that kind may have existed, it is the view of the court that that question cannot be determined by this court and jury. The consideration of questions of that kind—of the right of the railway company to be excused from the duty and obligation that is placed upon it by the fourth section of the Interstate Commerce Law—is, by the express terms of the law itself, conferred upon the Interstate Commerce Commission. As you know, there is a body of commissioners provided for by
108 this Interstate Commerce Act, and the fourth section of this act, by its express terms in a proviso that is therein contained, places upon the commission the duty and gives them the authority to investigate and determine whether there are such facts and circumstances surrounding a railroad at a given time, as would justify the commission in authorizing the railway company to charge a greater sum for a shorter than for a longer haul over the same line in the same direction under otherwise substantially similar circumstances. In the view that the court takes of it, this court and jury cannot determine that question, which, by the law, the commission are authorized to determine. Whether the railway company was justified by a cut rate, making what was called in argument 'illegitimate competition,' and circumstances of that kind which grow out of the handling and management of the railroad business of the country, by other competing lines, and its effect upon the business of the defendant company, in the judgment of the court, are questions that cannot be submitted to you. Questions of that kind are for the judgment and determination of the board of commissioners appointed under this act, and the courts

and juries when they are called to act upon particular cases arising under this act, where it is claimed that the law has been violated are only authorized to determine the question whether, in the service rendered, the character of the property, its conveyance, and other facts which inhere in the carrying of the freight upon the particular line which is charged with the wrong-doing, there existed dissimilar circumstances and conditions relieving the company from the charge of collecting a larger rate for the shorter haul over the same line in the same direction and under substantially similar circumstances and conditions.

109 "Now, then, if the railway company had been authorized by the commission to do that, then they could plead and prove that fact, and it would then be the duty of the court to instruct the jury that that would justify the railway company in making the larger rate for the shorter distance; but no such action has been taken by the Interstate Commerce Commission. They have not been called upon to act, and they have not authorized the railway company to charge a greater sum for the shorter than for the longer distance. Under the circumstances I have detailed before you, as I view it, this court and jury cannot authorize the railway company to make such charge or justify it after it has been done. There is no evidence in this case that the railway commission has ever passed upon the question or authorized the railway company to charge a greater sum for a shorter than for the longer distance. Therefore, the question comes down to this: Does the evidence satisfy you that at the time when the Chicago and North-Western Railway Company transported the oats and corn set forth in the schedule attached to the petition from Scranton, Iowa, to Chicago, Illinois, it had in force and operation a tariff rate whereby it did, either by itself or in conjunction with the other roads that have been named in your hearing, transport the like produce, corn and oats, from points in Nebraska over the same line, the Chicago and North-Western railway, in the same direction to Chicago, Illinois, at a rate less than it was charging for the like service for the plaintiff.

"Now, if it did do that—if there was any sufficient reason to influence the Chicago and North-Western to put a lower rate in operation in Nebraska, it had a right to do it, and had a right to fix this rate in competition to any secret rate to which it might be subjected in Nebraska, either directly or indirectly through the

110 operation of the competition that was brought to bear upon the roads connecting with theirs, the Fremont, Elkhorn and Missouri Valley and the Sioux City and Pacific, but if, by reason of that competition, or for any other reason, the Chicago and Northwestern Company did enter into a joint arrangement with these companies, in which it fixed this lower rate; then under the law it was charged with the duty of not charging a greater sum to

Iowa shippers for the shipping of the like produce, the like grain, over its line of road to Chicago, under substantially similar circumstances and conditions, because that was the shorter distance. And if it were in fact proven that it did charge a greater sum to Iowa shippers on the like produce and for the like service, it would establish a violation of the fourth clause of the Interstate Commission Law, because it would be charging a greater sum for hauling a shorter than for hauling a longer distance under substantially similar circumstances.

"Now then, gentlemen, it is for you to determine, under the evidence in this case, whether or no the produce that was forwarded by the plaintiff from Scranton was of the same kind that defendant forwarded under its tariff from Blair, Nebraska. The court can take judicial notice of distances, and instruct you that the distance is greater from Blair, Nebraska, to Illinois, than from Scranton, Iowa, to Illinois, and it is for you to determine, if there is any dispute in the evidence, whether the Nebraska grain passed over the same line, the Chicago and North-Western, that the freight did in going from Scranton, Iowa, to Chicago, Illinois.

"Is there any thing, then, in the evidence, as it is submitted to you, that would justify you in finding that there was any dissimilarity in the circumstances and conditions under which the defendant railway company forwarded the freight of the plaintiff from Scranton, Iowa, and under which it forwarded the produce, corn and oats, coming within this schedule or tariff of rates, when it re-
111 ceived the same from these connecting lines in Nebraska?

"As I have already said to you, the law, under this fourth section of the statute, requires that for similar services, rendered under similar circumstances, it shall not charge a greater sum for a shorter than for a longer haul over the same line and in the same direction. Has the plaintiff, upon whom is the burden of proof, satisfied you by a fair preponderance of the evidence, that as to any one or more of these shipments that are set forth in the petition, the defendant company did in fact charge a greater sum for hauling from Scranton the oats and produce of plaintiff than it charged for the like services from Blair, Nebraska, at the same time? If so, and if there is nothing in the evidence of the circumstances surrounding the transportation of this grain over the line of defendant's road that would justify defendant in making a larger rate from Scranton than from Nebraska points, then the company has charged a greater sum for making a shorter than a longer haul of the like property under like circumstances, and in so doing has violated the Interstate Commerce Law.

"There is a dispute between the parties, as to the rates that were charged as to some of these shipments. That is a matter for you to determine under the evidence, and if you find that, in fact,

the Chicago and North-Western Railway Company did not make any discrimination, and was not charging the plaintiff for conveying his property from Scranton a larger rate from Scranton, Iowa, to Chicago, than it charged at the same time from Blair and other points in Nebraska, to Chicago, then the plaintiff has failed to make out his case, and your verdict must be for the defendant.

"If, on the other hand, you find on this issue for the plaintiff; in other words, if you find that the Chicago and North-Western
112 Railway Company did charge more for the transportation from Scranton to Chicago that it was charging at the same time for the transportation of like property under like circumstances from Blair and other points in Nebraska; that would justify you in finding upon that issue for the plaintiff, and we then come to the rule of damages.

"The rule of damages under both counts of the petition is the same. First ascertain what the rate was that was fixed for the transportation from Blair and other points in Nebraska—that is, the rate per hundred pounds. Then find what the rate was in fact charged per hundred pounds to the plaintiff for forwarding the oats and corn from Scranton to Chicago. The difference between these two, if there is any, is the damage per hundred pounds that was caused to the plaintiff. Now, the schedules attached to the petition show the number of hundred pounds that is claimed to have been transported, and it is admitted in the answer that these were transported as shown, so there is no dispute on that point. Take the number of hundred pounds that you find were transported, and take the difference, if any, between these rates per hundred pounds, and by mere multiplication of one by the other you will find the amount of damage. It may be required that you make this computation more than once, because it is claimed that the difference was less at times than at other times, and that is for you to determine under the evidence. Take the number of hundred pounds of these shipments, as they are set forth in the schedule attached to the petition; ascertain the rates fixed by the tariff that you find defendant at that time had in force from Nebraska; take the difference between that and the rate actually charged the plaintiff, if there is any, and the difference is the damage per hundred pounds that has been caused the plaintiff.

113 "You understand, gentlemen, that it is the damage to the plaintiff that is to be considered. It is not a question of how much the defendant railway company may have received. When joint rates are made, the shipper had nothing to do with that; he has no control over that. His privilege is to deliver his freight that is to be transported to the railway company, and if it comes under the operation of a joint rate, it is not a matter of any moment as between him and the railway company that handles his freight,

what particular share or portion of the rate that is actually paid on the shipment, any particular railroad receives. If two or more railway companies entering into a joint tariff arrangement shall so carry it out as to cause a damage to the shipper, as, by way of illustration, charging him under the joint tariff three cents or five cents more than they ought to have charged him, it is not a question in which the shipper is interested, when he sues to recover, to know what particular division may have been made of the five cents thus illegally charged. The shipper would have a right to look to all of the railways, or to any one of them, which had aided in committing the wrong by receiving from him a larger rate than he ought to have been charged. If, by the effect of a joint tariff of rates, the Chicago and North-Western Company aided in putting in operation, the plaintiff was charged for shipping his grain from Scranton, five or six, or one cent more than they ought to have charged him, the plaintiff is entitled to recover in this action the amount of the overcharge he has paid, regardless of what division may have been made, or whether there was any division, between the different companies putting the joint rate into operation. Because, it is not a suit to recover back the amount the defendant company may have received, but it is an action sounding in
114 tort for damages, wherein the shipper seeks to recover the damages claimed to have been caused him by charging an illegal rate. The unlawful overcharge is the element on which the claim for damages is based.

"Under the law it is within your province to determine whether or not interest shall or shall not be paid on the amount of overcharge, if you find any. If you find that the plaintiff has been overcharged upon particular shipments; it is not a matter in which the law determines whether interest shall be given or not. In some cases founded on breach of contract the parties may be entitled to recover interest; but in cases for damages sounding in tort, and this is a case of that kind, it is within the province of the jury to award interest or not. If, in order to fairly compensate the plaintiff, in your judgment, he should receive six per cent. interest, it is within your power to award it."

The court refused to give the several instructions on the prayer of the defendant as hereinbefore set forth, and the defendant excepted to such decision as to each of said instructions numbered 1 to 9, both inclusive.

The defendant then excepted to the following portions of the charge and instructions given by the court to the jury, and to each of them.

First. "Evidence has been introduced in this case, upon which the court has been asked to submit to the jury for your determination as a matter of fact, whether the defendant railway company was not

justified in making the reduction of rates by reason of the fact
115 that it appeared, as it is claimed under the evidence, that there had been what is called a secret cut rate put in operation in Nebraska which affected business upon the line of the Fremont, Elkhorn and Missouri Valley and the Chicago and North-Western Railway, the result of this better rate being to cause quite a large portion of the business that would naturally be tributory to the Chicago and North-Western line to go south by way of St. Louis and Beardstown, and in that way through St. Louis and these southern points to the eastern seaboard.

"Under the ruling of the court upon the question of law, although a rate of that kind may have existed, it is the view of the court that that question cannot be determined by this court and jury. The consideration of questions of that kind, of the right of the railway company to be excused from the duty and obligation that is placed upon it by the fourth section of the Interstate Commerce Law, is, by the express terms of the law itself, conferred upon the Interstate Commerce Commission. As you know, there is a body of commissioners provided for in this Interstate Commerce Act and the fourth section of this act, by its express terms, in a proviso that is therein contained, places upon the commission the duty and gives them the authority to investigate and determine whether there are such facts and circumstances surrounding a railroad at a given time as would justify the commission in authorizing the railway company to charge a greater sum for a shorter than for a longer haul over the same line in the same direction under otherwise substantially similar circumstances. In the view that the court takes of it, this court and jury cannot determine that question, which, by the law, the commission are authorized to determine. Whether the railway company are justified, by a
116 cut rate, making what was called in argument 'illegitimate competition,' and circumstances of that kind which grow out of the handling and management of the railroad business of the country, by other competing lines, and its effect upon the business of the defendant company, in the judgment of the court, are questions that cannot be submitted to you."

Second. "Now, then, if the railway company had been authorized by the commission to do that, then they could plead and prove that fact, and it would then be the duty of the court to instruct the jury that that would justify the railway company in making the larger rate for the shorter distance; but no such action has been taken by the Interstate Commission. They have not been called upon to act, and they have not authorized the railway company to charge a greater sum for the shorter than for the longer distance. Under the circumstances I have detailed before you, as I view it, this court and jury cannot authorize the railway company to make such charge or justify it after it has been done."

Third. "So far as the matter of the rates from Blair and other points in Nebraska to Chicago being established by means of joint tariff arrangements between the defendant company and its connecting lines extending into Nebraska, that will not defeat the plaintiff's right of recovery, if the facts show that the defendant company was charging a greater sum for the like service at the same time and under the like circumstances for a shorter than a longer haul in the same direction over the same line on which it was carrying the grain shipped from Nebraska under the rates fixed by the joint tariff.

117 "What I mean to say is that, if from the evidence in this case and the instructions which shall be further given you by the court, you shall find that the Chicago and North-Western Railway Company had, by the entering into a joint tariff with the Freemont, Elkhorn and Missouri Valley Railroad Company and the Sioux City and Pacific Railroad Company, aided to put in operation tariff rates, whereby the corn and oats could be shipped from Blair and other points in Nebraska, under the like circumstances and conditions as the corn and oats shipped from points in Iowa, through Iowa, to the city of Chicago, and that by the doing thereof a larger sum was charged for a shorter haul than for a longer haul over the same line in the same direction, then the Chicago and North-Western Railway Company, by joining in that tariff and by aiding in putting it in operation, has rendered itself liable to be called to account by any one who has suffered damage by reason of the Chicago and North-Western Railway Company's charging that person a larger sum for the shorter than for the longer haul.

"In other words, companies cannot escape the duty and obligation that is placed upon them by the provisions of the Interstate Commerce Law by entering into joint tariffs. Railroads have the right to enter into these joint tariff arrangements—the business of the country could not be carried on, probably, at least not with any success, unless it was done, and they have a perfect right to do it. But when they do it, the duty and obligation is on them to observe the provisions of the Interstate Commerce Law in making and putting into operation these joint rates. It is just as much a violation of the law to charge a larger sum for a shorter than for a longer haul under substantially similar circumstances, if it is done by the operation of a joint tariff, as it would be if it was done by the operation of a single tariff by a single road."

118 *Fourth.* "The plaintiff sets forth his cause of action in two counts in the petition. In both counts he charges that on certain dates that are named in the accounts that are attached to the petition, he forwarded certain corn and oats from Scranton, a station upon the line of the Chicago and North-Western Railway, through to Chicago, and that he was charged at that time a rate greater

than the rate which the railway company was giving to its patrons or to others at Blair and other points in Nebraska, a point which is at a distance greater than is Scranton from the terminal point, Chicago.

"Now, as I understand it, the question that you have to determine, under the evidence in the case, is whether that statement is true. Is it true that upon any one or more of the shipments that are set forth in the schedule annexed to the petition, the plaintiff was required to pay a greater sum than was being charged at that time by the defendant, the Chicago and North-Western Railway Company, for performing the like service for the transportation of other grain of the same kind—corn and oats—from points in Nebraska, over the same line in the same direction, passing through Scranton to the city of Chicago?"

Fifth. "It is for you to determine, if there is any dispute in the evidence, whether the Nebraska grain passed over the same line, the Chicago and North-Western, that the freight did in going from Scranton, Iowa, to Chicago, Illinois."

Sixth. "If, on the other hand, you find on this issue for the 119 plaintiff; in other words, if you find that the Chicago and North-Western Railway Company did charge more for the transportation from Scranton to Chicago than it was charging at the same time for the transportation of like property under like circumstances from Blair and other points in Nebraska, that would justify you in finding upon that issue for the plaintiff, and we then come to the rule of damages."

Seventh. "Take the number of hundred pounds of these shipments, as they are set forth in the schedules attached to the petition, ascertain the rates fixed by the tariff that you find defendant at that time had in force from Nebraska, take the difference between that and the rate actually charged the plaintiff, if there is any, and the difference is the damage per hundred pounds that has been caused by the plaintiff."

The jury on the 28th of October, 1891, returned a verdict in favor of the plaintiff in assessing his damages for $225, and thereupon the defendant entered a motion for a new trial, which motion was overruled by the court, and judgment was entered upon the verdict on the 29th of October, 1891; to which decision of the court, and the entering of judgment, the defendant then and there excepted; and defendant was allowed sixty days from the date of judgment to settle and file bill of exceptions.

And for as much, as the facts aforesaid do not otherwise appear of record, the defendant prays that this bill of exceptions be signed and sealed by the court and made a part of the record, which is accordingly done on this 13th day of December, 1891, it being still

of the October term, 1891, of said court, and within said sixty days allowed to settle bill of exceptions.

(Signed) O. P. SHIRAS,
District Judge.

120 Endorsed: U. S. Cir. Court, South. Dist. Iowa, Central Div. John Osborn vs. C. and N. W. Ry. Bill of exceptions. Filed Dec. 15, 1891.

E. R. MASON,
Clerk.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA.
CENTRAL DIVISION.

MAY TERM, 1890. SATURDAY, May 17, 1890.

Present: HON. H. O. SHIRAS,
Judge.

John Osborne
vs.
Chicago and North-Western Railway Company. } *No. 3,428 Law.*

This cause coming on this day for hearing, was continued as per stipulation filed. The defendant to file answer within forty days of the adjournment of the May term, 1890.

123 UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

OCTOBER TERM. 1891. THURSDAY, OCTOBER 22, 1891.

Present: Hon. O. P. SHIRAS,
Hon. JOHN S. WOOLSON,
Judges.

John Osborne
vs.
Chicago and North-Western Railway Company.

This cause came on this day for hearing; plaintiff appeared by C. C. and C. L. Nourse, and the defendant by W. C. Goudy and N. M. Hubbard, and the defendant, by leave of court, filed an additional and amended answer.

Thereupon came a jury of twelve good and lawful men, to wit.: J. D. Brown, Geo. Cramer, Jacob Witmer, P. Wells, J. D. Rambo, G. W. Baker, Geo. Webster, Frank Gleason, R. D. Kellogg, F.

Smith, James Andrews, and Thomas Musson, who were duly and legally impaneled, and sworn to well and truly try the issues; and, after hearing a statement of the case from the plaintiff, they were excused from further consideration of the case until 10 o'clock to-morrow morning.

124 UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

OCTOBER TERM, 1891. FRIDAY, OCTOBER 23, 1891.

Present: Hon. O. P. SHIRAS,
Hon. JOHN S. WOOLSON,
Judges.

John Osborne
vs.
Chicago and North-Western Railway Company. } *No. 3,428 Law.*

This cause came on this day to be further heard; the parties appeared by their attorneys, and the jury came the same as on yesterday.

And it appearing to the court that the wife of Thomas Musson, one of the jurors impaneled in this cause, is dangerously ill, and by consent of parties in open court, it was ordered that said Thomas Musson be excused as juror in this cause, and from further attendance at this term of court; and that the cause proceed to the other eleven jurors empaneled in the cause.

And said jurors, having heard the statement of the defense and a portion of the evidence, were excused from further consideration of the case until 10 o'clock to-morrow morning.

125 UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

OCTOBER TERM, 1891. SATURDAY OCTOBER 24, 1891,

Present: HON. O. P. SHIRAS,
HON. JOHN S. WOOLSON,
Judges.

John Osborne,
vs.
Chicago and North-Western Railway Company. } *No. 3,428 Law.*

This cause came on this day to be further heard; parties appeared by their respective counsel and the jury came the same as yesterday, and having heard further evidence in the cause were excused

from further consideration of the cause until 10 o'clock Monday morning.

126 UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

OCTOBER TERM, 1891. MONDAY OCTOBER 26, 1891.

Present: HON. O. P. SHIRAS,
HON. JOHN S. WOOLSON,
Judges.

John Osborne,
vs.
Chicago and North-Western Railway Company. } *No. 3,428 Law.*

This cause came on this day to be further heard: parties appeared by counsel as heretofore, and the jury came the same as yesterday; and having heard further evidence were excused from further consideration of this cause until 10 o'clock to-morrow morning.

127 UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

OCTOBER TERM, 1891. TUESDAY OCTOBER 27, 1891.

Present: HON. O. P. SHIRAS,
HON. JOHN S. WOOLSON,
Judges.

John Osborne,
vs.
Chicago and North-Western Railway Company. } *No. 3,428 Law.*

This cause came on this day to be further heard; parties appeared by their counsel and the jury came the same as yesterday, and they, having heard the conclusion of the evidence, arguments of counsel, and the charge of the court, retire to a private room in charge of a sworn officer, to consider of their verdict.

128 UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

OCTOBER TERM, 1891. WEDNESDAY, OCTOBER 28, 1891.

Present: HON. O. P. SHIRAS,
HON. JOHN S. WOOLSON,
Judges.

John Osborne
vs.
Chicago and North-Western Railway Company. } *No. 3,428 Law.*

This cause having been heretofore submitted to the jury, they this day return in open court the following verdict, to wit:

"In the case of John Osborne *vs.* Chicago and North-Western Railway Company we, the jury, find for the plaintiff and assess the damages at two hundred and twenty-five dollars ($225).

(Signed) R. D. KELLOGG,
Forman.

129 UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

OCTOBER TERM, 1891. THURSDAY, OCTOBER 29, 1891.

Present: HON. O. P. SHIRAS,
HON. JOHN S. WOOLSON,
Judges.

John Osborne
vs.
Chicago and North-Western Railway Company. } *No. 3,428 Law.*

This cause came on this day to be further heard upon the motion of the plaintiff for judgment upon the verdict of the jury herein; parties appeared by their respective counsel and the court being advised, it was

Ordered and adjudged that the plaintiff have and recover of and from the defendant, the Chicago and North-Western Railway Company the sum of two hundred and twenty-five dollars ($225) with interest, and the further sum of two hundred dollars ($200) as attorney's fees herein, and the costs of this suit taxed at $ and that execution issue therefor. To which judgment the defendant at the time excepted.

By consent of parties in open court it is ordered that the defendant be given sixty days from this date to present bill of exceptions.

IN THE

Supreme Court of the United State

PETITION FOR CERTIORARI TO THE EIGHT JUDICIAL CIRCUIT.

IN THE MATTER OF

THE CHICAGO & NORTHWESTERN RAILWAY CO.

PLAINTIFF IN ERROR,

vs.

JOHN OSBORNE, DEFENDANT IN ERROR.

AND

THE CHICAGO & NORTHWESTERN RAILWAY CO.

vs.

JUNOD AND CULBERTSON.

With Copy of Opinion and Brief.

C. C. NOURSE,
Of Counsel for Petitioners.

W. C. GOUDY, *for the R. R. Co.*

Judd & Detweiler, Prs., Washington, D. C.

128 UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

OCTOBER TERM, 1891. WEDNESDAY, OCTOBER 28, 1891.

Present: HON. O. P. SHIRAS,
HON. JOHN S. WOOLSON,
Judges.

John Osborne
vs.
Chicago and North-Western Railway Company. } *No. 3,428 Law.*

This cause having been heretofore submitted to the jury, they this day return in open court the following verdict, to wit:

"In the case of John Osborne *vs.* Chicago and North-Western Railway Company we, the jury, find for the plaintiff and assess the damages at two hundred and twenty-five dollars ($225).

(Signed) R. D. KELLOGG,
Forman.

129 UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

OCTOBER TERM, 1891. THURSDAY, OCTOBER 29, 1891.

Present: HON. O. P. SHIRAS,
HON. JOHN S. WOOLSON,
Judges.

John Osborne
vs.
Chicago and North-Western Railway Company. } *No. 3,428 Law.*

This cause came on this day to be further heard upon the motion of the plaintiff for judgment upon the verdict of the jury herein; parties appeared by their respective counsel and the court being advised, it was

Ordered and adjudged that the plaintiff have and recover of and from the defendant, the Chicago and North-Western Railway Company the sum of two hundred and twenty-five dollars ($225) with interest, and the further sum of two hundred dollars ($200) as attorney's fees herein, and the costs of this suit taxed at $ and that execution issue therefor. To which judgment the defendant at the time excepted.

By consent of parties in open court it is ordered that the defendant be given sixty days from this date to present bill of exceptions.

146 U.S. 354

Office Supreme Court U. S.
FILED.
NOV 21 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

PETITION FOR CERTIORARI TO THE EIGHTH JUDICIAL CIRCUIT.

IN THE MATTER OF

THE CHICAGO & NORTHWESTERN RAILWAY CO.,

PLAINTIFF IN ERROR,

vs.

JOHN OSBORNE, DEFENDANT IN ERROR.

1238

AND

THE CHICAGO & NORTHWESTERN RAILWAY CO.,

vs.

JUNOD AND CULBERTSON.

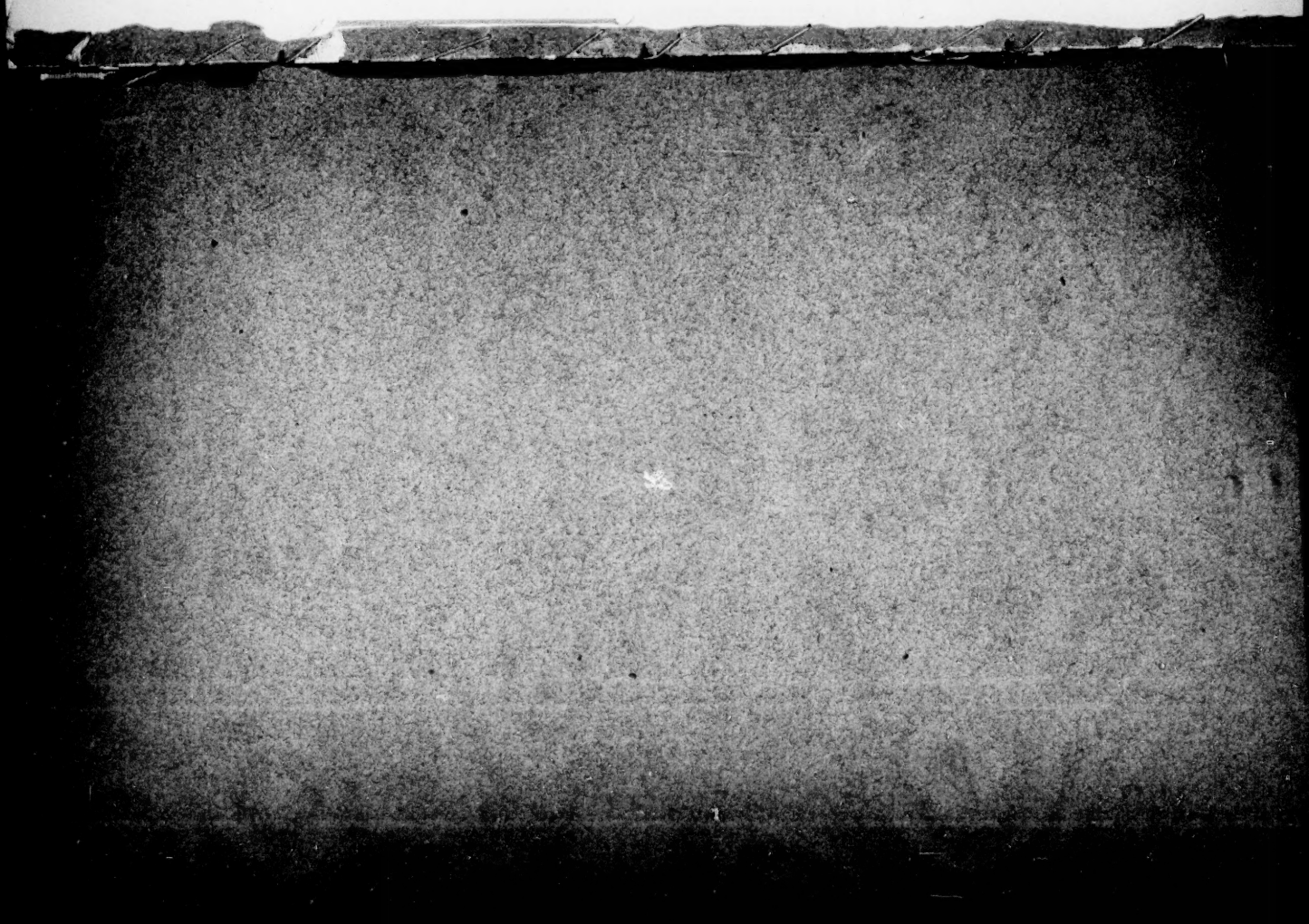
1239

With Copy of Opinion and Brief.

C. C. NOURSE,
Of Counsel for Petitioners.

W. C. GOUDY, *for the R. R. Co.*

Judd & Detweiler, Prs., Washington, D. C.



Supreme Court of the United States.

OCTOBER TERM, 1892.

Petition for Writ of Certiorari.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN OSBORNE, DEFENDANT IN ERROR.

THE SAME

vs.

JUNOD & CULBERTSON.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT.

To the Honorable the Supreme Court of the United States:

Your petitioner, John Osborne, a citizen of the State of Iowa, in the eighth judicial circuit of the United States of America, humbly prays your honorable Court to issue your

writ of certiorari to the United States circuit court of appeals for the eighth judicial circuit, commanding said United States circuit court of appeals to certify to your honorable Court the record of its proceedings in a certain cause heretofore pending and determined in said court, wherein The Chicago and Northwestern Railway Company was plaintiff in error and John Osborne defendant in error, which cause was heard upon a writ of error issued by the said United States circuit court of appeals to the circuit court of the United States for the southern district of Iowa, central division. A copy of the record of the said cause in said circuit court of appeals is herewith filed and made a part of this application.

It will appear from the said record that your petitioner, then as now, a citizen of the State of Iowa, did on the 27th day of January, A. D. 1890, enter his certain suit in the said United States circuit court for the southern district of Iowa, central division, at Des Moines, Iowa, against the said Chicago and Northwestern Railway Company, a body corporate organized under the laws of the State of Illinois, and a citizen of said State and a common carrier, transacting business and operating a railroad within the State of Iowa and the said State of Illinois, in which suit your petitioner claimed to recover damages against the Chicago and Northwestern Railway Company by reason of certain violations by the said common carrier of the provisions of the act of Congress approved February 4, A. D. 1887, entitled "An act to regulate commerce," and commonly known as the Interstate Commerce act; and your petitioner begs leave to refer to said petition, which is set out in the record, herewith filed, of said cause, wherein is particularly set forth the

particular acts claimed by your petitioner to have been a violation of the said act of Congress, and which specifies particularly the damages claimed therefor.

Your petitioner further shows that the said Chicago and Northwestern Railway Company entered its appearance in said cause, filed its answer therein, and joined issue upon the allegations of said petition; and afterwards the said cause was tried before a jury upon the particular instructions and directions of said United States circuit court, and a verdict was rendered in behalf of your petitioner for the sum of two hundred and twenty-five dollars damages, and that afterwards, to wit, on the 29th day of October, A. D, 1891, judgment was rendered by the said court upon the said verdict for the sum of two hundred and twenty-five dollars and for the attorneys' fees and for costs.

Your petitioner further shows that, to wit, on the 3d day of December, A. D. 1891, the said Chicago and Northwestern Railway Company sued out its certain writ of error to the said United States circuit court of appeals for the eighth judicial circuit and assigned for error in the trial of said cause as is specified in the record hereto attached.

Your petitioner further shows that upon the hearing of said writ and said assignment of errors the United States circuit court of appeals, then sitting at St. Paul, in the State of Minnesota, did file its certain opinion reversing the judgment of the said United States circuit court for the southern district of Iowa, a copy of which opinion is herein set forth and made a part of this application.

Your petitioner shows that in said opinion it is determined by said United States circuit court of appeals that it was the duty of the United States circuit court for the southern dis-

trict of Iowa, under the state of facts as set forth in the record annexed, to have directed a verdict for the defendants, and that no cause of action existed against the said common carrier by reason of the averments and allegations of the petition filed as aforesaid by your petitioner and under the proof and evidence as set forth in the record of said cause.

Your petitioner respectfully begs leave to suggest that there is error in the opinion of the said United States circuit court of appeals, in this:

That said court wrongfully determined that the defendant, The Chicago and Northwestern Railway Company, was not required by law to conform its local rates for the shorter haul to an amount not greater than it charged at the same time for a like commodity for the longer haul under the joint tariff with the Fremont, Elkhorn and Missouri Valley and the Sioux City and Pacific Railway Companies, and

That said court further wrongfully held and determined that it was not the duty of the said Chicago and Northwestern Railway Company, as a common carrier, to make known to the public at points in Iowa the rates that it had established in the joint tariff with the Fremont, Elkhorn and Missouri Valley and the Sioux City and Pacific Railway Companies and in charging and receiving a greater amount for the shorter than for the longer haul, and

That said court wrongfully ordered that it was the duty of the United States circuit court below to have instructed the jury to return a verdict for the defendant, The Chicago and Northwestern Railway Company, and

That the said court further wrongfully held that the judgment of the United States circuit court below should be reversed and set aside.

Your petitioner further shows, as a cause why said writ should issue, that the greater part of the interstate commerce carried on by means of railroad transportation in the United States is effected by means of joint tariffs and arrangements between railroads having and maintaining distinct corporate organizations; that as early as September, 1887, the Interstate Commerce Commission, in the case of Boston and A. Railway Company *vs.* Boston and L. Railway Company (1 I. S. C. Rep. p. 576), delivered its opinion in the matter there pending before it, in which it was determined that "Any common carrier is as much restrained when it unites with one or more others in making the long-haul charge as when it makes such charge independently;" and that the word "line," as used in the act of Congress, means a "physical line," and "not a business arrangement," and that "one piece of road may be a part of several lines."

Your petitioner begs leave to suggest that in pursuance of this decision of the Interstate Commerce Commission, followed by numerous other decisions made by said Commission, the various railroads of the country have conformed their traffic thereto.

Your petitioner begs leave further to suggest that the evils intended by Congress to be remedied by the enactment of this law to regulate commerce must continue to exist throughout the United States, with scarcely any limitation or mitigation, under the ruling and decision of the United States circuit court of appeals aforesaid.

Your petitioner further suggests that, the amount of judgment recovered by plaintiff in this cause in the United States circuit court for the southern district of Iowa being less than the sum of one thousand dollars, your petitioner is

without remedy, except by the exercise of the powers conferred upon this Court under section six of the act of Congress approved March 3, A. D. 1891, entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes."

Wherefore your petitioner prays that your writ of certiorari may issue, as hereinbefore prayed, and that the record of said cause may be duly certified to this Court for your review and determination, and that you exercise the same power and authority in the premises as though this cause had been brought here for review by writ of error or appeal.

C. C. NOURSE,
CLINTON L. NOURSE,
Attorneys for Osborne, Defendant in Error.

STATE OF IOWA, }
Greene County, } *ss:*

I, John Osborne, being first duly sworn according to law, do depose and say that I was the defendant in error in the above-entitled cause in the United States circuit court of appeals for the eighth judicial circuit; that I have read the foregoing petition and know its contents, and the same is true as I verily believe.

JOHN OSBORNE.

Subscribed in my presence and before me sworn to by John Osborne, at Scranton, Greene county, Iowa, this 7th day of November, A. D. 1892.

[SEAL.] W. M. EASON,
Notary Public in and for Greene County, Iowa.

I, Charles C. Nourse, of counsel for John Osborne, defendand in error, as set forth in the foregoing petition, do hereby certify that I believe said petition to be well founded, and that the said defendant is entitled to the relief prayed.

CHARLES C. NOURSE.

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

No. 67. October Term, A. D. 1891.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN OSBORNE, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Iowa

Mr. W. C. Goudy, Mr. N. M. Hubbard, for plaintiff in error.

Mr. C. C. Nourse, Mr. C. L. Nourse, for defendant in error.

Before Brewer, circuit justice, and Caldwell and Sanborn, circuit judges.

The defendant in error, plaintiff below, recovered a judgment in the circuit court of the United States for the southern district of Iowa for the sum of $225 for alleged overcharges on corn shipped from Scranton, Iowa, to Chicago. The action was brought under the Interstate Commerce act of February 4th, 1887, 24 Stat., 379. The facts material to the inquiry are as follows:

The defendant owns and operates a railroad from Missouri Valley, a town on the western border of Iowa, to Chicago, Illinois. Scranton is a town in Iowa on the line of this road

88 miles east of Missouri Valley, and therefore so much nearer Chicago. The Fremont, Elkhorn and Missouri Valley Railroad Company owns a railroad running east and west through Nebraska and connecting with the defendant's road at the town of Missouri Valley. Blair, Nebraska, is a point on that road thirteen miles west of Missouri Valley. While the Fremont, Elkhorn and Missouri Valley Railroad Company is an independent corporation, a majority of its stock belongs to the defendant company, and thus the defendant company controls its operations.

During the month of January, 1888, there was in force a local tariff of rates charged on the defendant's road. This local tariff was duly published in Scranton. In accordance with it the rate from Scranton to Chicago on corn was 18 cents per hundred pounds. All shippers shipping simply to Chicago paid that rate. The plaintiff, among others, made sundry shipments, and was charged and paid such sum. There was, so far as appears, absolute uniformity of rate as to all such local shipments. At the same time the tariff on corn shipped through from Blair, Nebraska, to New York city was 38½ cents; to Boston, Philadelphia, and Baltimore, sums slightly above and below this figure. This through rate was made up in this way: By agreement between the defendant and eastern companies corn was shipped through to New York from Turner and Rochelle, two small stations on the defendant's road, one 30 and the other 70 miles west of Chicago, for 27½ cents, 3½ cents of which went to defendant, and the balance to the eastern companies; and by agreement between the defendant and the Fremont, Elkhorn & Missouri Valley Railroad Company, the rate from Blair to Turner and Rochelle, on corn shipped to New York, Boston, Philadelphia, or Baltimore, was 11 cents. In other words, by these agreements of the several companies a through rate was fixed on corn shipped from Blair to New York and other eastern cities, and of that through rate the defendant company received, for carrying the whole line of

its road, less than the local tariff of 18 cents, charged from Scranton to Chicago. This joint tariff was not published at Scranton, and no knowledge of it was given to or possessed by the plaintiff until February 24th and until that time he made no application for shipment beyond Chicago. Thereafter he shipped to Boston, and received the benefit of the through tariff.

BREWER, circuit justice, delivered the opinion of the court:

This case must be determined exclusively by the provisions of the Interstate Commerce law, as it was originally passed and before any amendment. No question was submitted to the jury, and no evidence was offered as to whether 18 cents was or was not, in fact, a reasonable rate for carrying corn from Scranton to Chicago. The theory of the plaintiff's case was that the defendant company had violated the fourth section of the act by charging more for a short than for a long haul; and of course if it had, it is liable to the plaintiff.

We do not care to enter into any extended discussion of the Interstate Commerce act. It was the first effort of the General Government to regulate the great transportation business of the country. That business, though of a quasi-public nature, and therefore subject to governmental regulation, has, as a matter of fact, been carried on by private capital through corporations. The fact that it was a quasi-public business always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit for its use. A reasonable compensation was all that they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it. With him, however, lay the burden of proving the fact that the charge was unreasonable—a burden which all experience shows was onerous and therefore seldom undertaken, the party aggrieved preferring to submit to the overcharge rather than

go to the expense and time of contesting it. Hence the efforts by State and nation to establish limits of charges and means of evidence of easy and accurate ascertainment. While it is the duty of the courts to see that the provisions established by Congress are not frittered away on technical or trifling grounds, yet it is also equally their duty to see that such legislation is not carried beyond its clear scope, and that the owners of private capital in the business of transportation be not deprived of their liberty of contract and right of control any farther than the law-making power has intended that they should be.

With these preliminary observations, we remark—

First. That Congress has not attempted to require that the tariffs on all roads be uniform, nor has it attempted to place a limit in figures beyond which no company may go in its charges. The laws of business and of competition have as yet been deemed sufficient restraints in that direction. The Rock Island is, between Chicago and the Missouri river, a parallel and competing road with the defendant company, yet there is nothing in the commerce act which compels either company to charge for through or local transportation the same as its competitor. Either company may reduce its rates as far as it pleases below what is reasonable and a fair compensation for the service without violating the act, and such reduction compels no change by its competitor or any other company. This is obvious from a mere reading of the act.

Secondly. That where two companies owning connecting lines of road unite in a joint through tariff they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies, by agreement, make a joint tariff over their lines or any parts of their lines, such joint tariff is not the basis by which the

reasonableness of the local tariff of either line is determined. To illustrate: On the defendant's road the distance from Turner to Chicago is 30 miles; on the Lake Shore line from Chicago to Cleveland it is two or three hundred miles. The defendant company may charge 15 cents for transporting grain the 30 miles from Turner to Chicago, providing that be in fact only a reasonable charge for the service, although the Lake Shore Company charges no more for transporting it from Chicago to Cleveland; and the fact that the rate on each line is 15 cents for the distance named will not prevent the two companies from making a joint tariff for grain shipped from Turner to Cleveland of 12 cents—less than the local tariff of either. That we may not be misunderstood we do not mean to intimate that the two companies with a joint line can make a tariff from Turner to Cleveland higher than from Turner to Buffalo or for any other intermediate point between Cleveland and Buffalo, for when the two companies by their joint tariff make a new and independent line that new and independent line may become subject to the long-and-short-haul clause; but what we mean to decide is that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned.

This proposition may not be as obvious as the former, and yet a careful study of the act leaves no doubt of its correctness. In the first section a definition is given of the term "railroad," which, in addition to bridges and ferries, includes "also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease." A joint tariff does not bind road to road in the sense that the two are used or operated by either corporation. There is neither unity of ownership nor unity of operation, but only a singleness of charge and a continuity of transportation over connecting roads. Neither is there any mandate to connecting companies to surrender any control over their own roads or to unite in a

joint tariff. "Reasonable, proper, and equal facilities for the interchange of traffic" are commanded by the third section, but with the proviso, "This shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like business." No power existed at common law and none is given by the act to court or Commission to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite in a joint tariff. Express cases (117 U. S., 1); Bridge Co. *vs.* R. R. Co. (37 Fed. Rep., 567); R. R. Co. *vs.* R'y Co. (41 Fed Rep., 559). The whole matter is left to the voluntary action of the companies, and in forming by agreement any joint tariff the basis of division and the proportion of moneys each shall take is also a matter left to their determination.

The denunciation of the fourth section is against each separate common carrier for its violation of the "long-and-short-haul" clause on its own line. The language is, "That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance." The use of the word "line" is significant. Two carriers may use the same road, but each has its separate line. The defendant may lease trackage rights to any other railroad company, but the joint use of the same track does not create the "same line," so as to compel either company to graduate its tariff by that of the other.

Further, by section 6 every common carrier is required to print and publish at every depot along its own road schedules showing its rates and fares and charges. There is a prohibition against advancing rates without giving notice, and in case of a reduction, notice thereof must be immedi-

ately posted; whereas in reference to joint tariffs the requisition is simply that each common carrier furnish to the Commission a copy of all contracts therefor, as well as copies of the joint tariffs, and power is given to the Commission to determine the amount of publication that shall be required.

Again, at the time of the passage of this act joint through tariffs were well known, as well as the fact that they were generally less than the sum of the local tariffs, and not distributed between the several companies making them according to the mere matter of mileage. In this act joint tariffs are recognized, and if Congress had intended to make the local tariff subordinate to or measured by the joint tariff its language would have been clear and specific.

It is worthy of note that in the debates which attended the passage of this bill through the two houses, and while this matter was under discussion, it was again and again said by those participating in the debates that the line formed under the joint tariff of connecting companies was one separate and independent from that of either of the connecting companies; and also worthy of note that in the actual administration of affairs by the Interstate Commerce Commission the same thing has been constantly recognized.

Applying these propositions to the case at bar, a conclusion is easily reached. There is no pretense that any shipper at Scranton, or other point on the defendant's line farther from Chicago than that, was charged less for shipping grain to Chicago than the plaintiff. In other words, there was no violation of the "long-and-short-haul" clause by the defendant in respect to its own line; nor did the defendant, acting with eastern companies, on the line made by its road in connection with theirs, charge or receive for grain shipped from Scranton or any point west, to any eastern point, less than the through tariff. In other words, the defendant did not separately or in connection with other companies violate section 4. It avails the plaintiff nothing

that he was unaware of this through joint tariff at the time he made the shipments which are the basis of his cause of action. No false statement was made to him. He made no inquiry in respect to its existence. The matter of publication was by the act, as it then stood, left to be determined by the Commission. The provision of the statute, section 6, is as follows: "Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published." And the order of the Commission made June 21 1887, provided that "such joint tariffs shall be so published by plainly printing the same in large type of at least the size of ordinary "pica," copies of which shall be kept for the use of the public in such places and in such form that they can be conveniently inspected, at every depot or station upon the line of the carriers uniting in such joint tariff, where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid." Scranton was no competing point; no other line, so far as appears, touched the place, and hence no publication of the joint tariff was there required. Of course the defendent was under no common-law or statute obligation to advise the plaintiff where or how he had better ship his grain; it fulfilled its legal obligation when it published its local tariff and advised him truthfully in respect to any rates in respect to which he made special inquiry.

For the reasons above stated, on the facts as they appeared in evidence, the jury should have been instructed to find a verdict for the defendant. The judgment of the court

below will be reversed, and the case remanded for further proceedings in accordance with this opinion.

Case No. 68—Chicago and Northwestern Railway Company, plaintiff in error, *vs.* H. A. Junod and R. Y. Culbertson, defendants in error, involves the same questions, and the same judgment of reversal will be entered.

Filed October 17, 1892.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

BRIEF OF COUNSEL FOR THE APPLICATION FOR CERTIORARI.

The petition for the writ is the same in each of the above cases except as to the names of parties, dates, and amounts. The circuit court of appeals disposed of both cases upon the opinion filed in the case of Osborne, and the questions involved are identical.

The nature of the controversy is fully set forth in the petition, and this brief is prepared more especially to call the attention of the Court to the statute providing this remedy.

I.

Has this Court jurisdiction by the terms of the act of Congress to issue the writ in a case brought for damages under the provisions of the Interstate Commerce law, where the amount recovered in the circuit court is less than one thousand dollars?

Section 6 of the act of Congress under which this petition is filed provides "that in such cases as is *hereinbefore* made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The prior part of section six provides *in terms* that in certain classes of cases therein specified the decision of the cir-

cuit court of appeals shall be final, and neither of the classes specified embraces cases brought under the act of Congress to regulate commerce.

This fact, without further consideration of the preceding sections of the act and of its scope and purpose, would seem to exclude all cases brought under the Interstate Commerce law from review on certiorari, but such a conclusion, we suggest, is not according to the spirit or letter of the statute and would assume that Congress had been guilty of a very grave omission and injustice.

It will be observed that the title of this act of Congress is not alone to establish or define the jurisdiction of the circuit court of appeals, but also to "define the jurisdiction of the courts of the United States." The fifth section of the act therefore defines and limits the jurisdiction of the Supreme Court of the United States upon appeal or writ of error to six specified classes of cases. Suits, therefore, brought under the Interstate Commerce law not belonging to any of these six classes of cases are excluded from the jurisdiction of this Court, upon appeal or writ of error, under section five of the act.

The first clause of section 6 gives the circuit court of appeals jurisdiction of all final judgments and decrees of the circuit courts, which of course includes suits brought under the Interstate Commerce act.

We have, therefore, the provisions of the act that precede the provisions for review by this Court upon certiorari denying jurisdiction to this Court upon appeal or writ of error and vesting it alone in the circuit court of appeals.

In other words, the act does make the judgment of the circuit court of appeals final, because it expressly gives that

court jurisdiction upon appeal or writ of error, and makes no provision for a review by this Court upon appeal or writ of error, and therefore this case is within the very provisions of the law which provides that in all such cases this Court shall have jurisdiction to review the case upon certiorari.

II.

Does this case come within that class of cases in which this court in its discretion ought to exercise such a jurisdiction?

It is only necessary upon this point to suggest that the decision of the circuit court of appeals, if permitted to stand as a binding precedent upon the United States courts for the eighth judicial circuit, practically abolishes or renders nugatory the long-and-short-haul clause of the Interstate Commerce act in the great food-producing area of that circuit, and at the same time the adjudications and orders of the Interstate Commerce Commission, operating upon and respected by the railroads of the other States, produces that very want of uniformity, injustice, discrimination, and confusion that it was the design of the framers of the Constitution to prevent in giving to Congress the power to regulate commerce between the States.

What signifies national legislation and national regulation and control, with local diversity of judicial interpretation and application?

Every experienced lawyer and jurist will recognize the fact that practically the rights of the people are more affected by judicial interpretation and application of the law than by the letter of the statute.

And the provision of section 6 of the act of Congress giving this Court the power to review the decisions of the circuit court of appeals by certiorari was intended in these important matters affecting vitally the interests of commerce among the States, to secure uniformity of rights by securing uniformity of interpretation.

In the case "*Re* Woods, 143 U. S., 206," this Court, speaking by Chief Justice Fuller, quotes from Mr. Everett, who had charge of the bill in the Senate, and uses the following language: "'In the *interest of jurisprudence* and *uniformity of decision*,' provision was made under section 6 for such supervision on our part as would tend to avert diversity of judgment and guard against inadvertence of conclusions involving weighty and serious matters."

It is not, of course, the amount in controversy in this particular case, though a number of other cases are pending in the United States circuit courts depending for their disposition upon these cases, but it is the rule of civil conduct applicable to the commerce of the people of great States.

In the case of "Lau Ow Bew" this Court held that the right of a Chinaman to return to America after acquiring a domicile in the State of Oregon, depending as it did upon rights secured by treaty with a foreign nation, was a question of such weighty and serious concern as called for the interposition of this Court by certiorari under the provisions of section 6 of this act of Congress. The question this Court is now asked to consider and review seriously affects the rights and commercial relations of the people of ten great States of the Union.

Since the opinion of Judge Brewer, or rather concurrently

146 U.S. 354

Office Supreme Court U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

JOHN OSBORNE

vs.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY.

Petition for Writ of Certiorari.

OBJECTIONS BY CHICAGO & NORTH-WESTERN RAILWAY COMPANY TO ALLOWING THE WRIT OF CERTIORARI.

W. C. GOUDY,
FOR CHICAGO & NORTH-WESTERN RAILWAY COMPANY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

JOHN OSBORNE

vs.

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Petition for Writ of Certiorari.

OBJECTIONS BY CHICAGO & NORTH-WESTERN RAILWAY COMPANY TO ALLOWING THE WRIT OF CERTIORARI.

As provided in the statute, an appeal or writ of error can only be prosecuted from a final judgment. By the rules of the common law where a writ of *certiorari* would lie, it was only from a final judgment.

Section 6 of the act of March 3, 1891, creating Circuit Courts of Appeal, after providing that the judgments of the Circuit Courts of Appeal shall be final, with some exceptions, contains the following provision:

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to

the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

As a case could not be carried by appeal or writ of error to the Supreme Court, except where a final judgment had been rendered in the court below, it seems to follow beyond controversy that Congress did not intend to authorize the removal of a case by a writ of *certiorari* from the Circuit Court of Appeals to the Supreme Court, except in cases where the judgment of that court was a final one.

The preceding paragraph of that section does provide that the Circuit court of Appeals may certify to the Supreme Court any questions or propositions of law concerning which it desires the instruction of that court for its proper decision, but there is no such language in the paragraph authorizing the writ of *certiorari*. If it had been intended to require the Court of Appeals by an order in this court to send up some particular question before a final judgment was entered, it would have been made manifest by similar language with reference to the writ of *certiorari*, as was done in cases pending in the Circuit Court of Appeals, providing that questions or propositions of law might be certified for decision.

In this case a judgment was rendered by the Circuit Court for the Southern District of Iowa in favor of Osborne against the railway company for damages, from which judgment a writ of error was prosecuted and the Circuit Court of Appeals for the Eighth Circuit reversed that judgment and remanded the case for proceedings consistent with the opinion. There is, therefore, no judgment of the Circuit Court of Appeals, except for costs of that court. There is no judgment of the Circuit Court

to which the case is remanded. When a judgment shall be rendered by that court in conformity with the opinion Osborne can carry the case to the Circuit Court of Appeals and, if that court remains of the same opinion and affirms the judgment of the court below, then there would be a final judgment which might be removed by the writ of *certiorari* to this court for review.

For these reasons objection is made to the granting of the prayer of the petition, as the case now stands.

The same objections apply to the application for a writ of *certiorari* on the petition of H. A. Junod and R. Y. Culbertson.

W. C. Goudy,

For Chicago and Northwestern Railway Company.